

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
YAVAPAI COUNTY, ARIZONA

FOR THE COUNTY OF YAVAPAI FEB 15 AM 8:56 ✓

SANDRA K. HALL, CLERK  
BY: C. Fleck

STATE OF ARIZONA, )  
 )  
Plaintiff, )  
 )  
vs. ) Case No. V1300CR201080049  
 )  
JAMES ARTHUR RAY, ) Court of Appeals  
 ) Case No. 1 CA-CR 11-0895  
Defendant. )  
\_\_\_\_\_ )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE WARREN R. DARROW  
ORAL ARGUMENT ON DEFENDANT'S MOTION FOR NEW TRIAL  
AUGUST 16, 2011  
Camp Verde, Arizona

**ORIGINAL**

REPORTED BY  
MINA G. HUNT  
AZ CR NO. 50619  
CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2 FOR THE COUNTY OF YAVAPAI  
3  
4 STATE OF ARIZONA, )  
5 Plaintiff, )  
6 vs ) Case No V1300CR201080049  
7 JAMES ARTHUR RAY, ) Court of Appeals  
8 Defendant ) Case No 1 CA-CR 11-0895  
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11  
12  
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24 REPORTED BY  
25 MINA G HUNT  
AZ CR NO 50619  
CA CSR NO. 8335

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EXHIBITS ADMITTED

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1 Proceedings had before the Honorable  
2 WARREN R. DARROW, Judge, taken on Tuesday,  
3 August 16, 2011, at Yavapai County Superior Court,  
4 Division Pro Tem B, 2840 North Commonwealth Drive,  
5 Camp Verde, Arizona, before Mina G. Hunt, Certified  
6 Reporter within and for the State of Arizona.  
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## PROCEEDINGS

11 10 01AM 2 THE COURT: This is V1300CR201080049, State  
 11 10 10AM 3 versus James Arthur Ray. Mr. Ray is present with  
 11 10 20AM 4 his attorneys, Mr. Li, Mr. Kelly, Ms. Seifter and  
 11 10 30AM 5 Ms. Do. The state's represented by Ms. Polk and  
 11 10 40AM 6 Mr. Hughes. This is the time set for oral argument  
 11 10 50AM 7 on the motion for new trial.

11 10 55AM 8 This is a late start. We had a  
 11 11 05AM 9 difficulty, a transport issue, on a postconviction  
 11 11 15AM 10 relief matter, ended up doing it telephonically and  
 11 11 25AM 11 caused considerable delay.

11 11 35AM 12 I do want to get an idea with regard to  
 11 11 45AM 13 scheduling. I wanted to have another hour allowed  
 11 11 55AM 14 for this.

11 12 05AM 15 But, Counsel, where do things stand on  
 11 12 15AM 16 that?

11 12 25AM 17 MR. KELLY: Judge, I'm not sure of the state's  
 11 12 35AM 18 requirements in terms of time, but I believe ours  
 11 12 45AM 19 is relatively brief. We did not request any oral  
 11 12 55AM 20 argument or even specify a time. I know we, I  
 11 01 05AM 21 believe, if I recall correctly, estimated 90  
 11 01 15AM 22 minutes per side during an informal status  
 11 01 25AM 23 conference, telephonic status conference, some  
 11 01 35AM 24 weeks ago. I believe that can perhaps be shortened  
 11 01 45AM 25 depending upon the inquiry from the Superior Court

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11 11 16AM 1 as to the defense. But --

11 11 20AM 2 THE COURT: 90 minutes -- there is plenty of  
 11 11 24AM 3 time for that because we have the rest of the day  
 11 11 28AM 4 now.

11 11 26AM 5 MR. KELLY: I don't see any time constraints  
 11 11 28AM 6 is what I'm trying to say. I'm not sure what the  
 11 11 31AM 7 state needs.

11 11 33AM 8 THE COURT: I'll ask, Ms. Polk.

11 11 34AM 9 MS. POLK: Good morning, Your Honor.  
 11 11 36AM 10 Your Honor, I estimate about three hours for my  
 11 11 38AM 11 argument.

11 11 38AM 12 THE COURT: Okay. Then it's -- it will be  
 11 11 41AM 13 very close, then. So we should get started. Let's  
 11 11 48AM 14 just -- we're going to divide the time equally.  
 11 11 52AM 15 That's the issue. And right now we start at 1:00,  
 11 11 57AM 16 we have about four and a half hours total.

11 12 02AM 17 MR. KELLY: Judge, I can begin this argument  
 11 12 04AM 18 by stating simply that I believe the issues are  
 11 12 07AM 19 well framed in the pleadings. To me -- and  
 11 12 11AM 20 Ms. Polk can correct me if I'm wrong -- I don't see  
 11 12 15AM 21 issues regarding the law or the facts as to the  
 11 12 23AM 22 alleged error asserted by the defense.

11 12 23AM 23 I believe that you have to consider the  
 11 12 25AM 24 cumulative effect of that information on my  
 11 12 29AM 25 client's right to a fair trial. That decision,

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11 12 33AM 1 Judge, I believe, is squarely on the Court's  
 11 12 35AM 2 shoulders, and it's necessary for you to evaluate  
 11 12 38AM 3 and make a decision.

11 12 42AM 4 That's pretty much our argument. We can  
 11 12 45AM 5 respond to any specific inquiry from the Court or  
 11 12 48AM 6 counsel. But I really don't have much more to add.

11 12 52AM 7 THE COURT: There has been rather extensive  
 11 12 55AM 8 briefing. And I've read the briefing. I have not  
 11 12 57AM 9 read all of the attachments -- well, recently.  
 11 13 02AM 10 Many of them I've read because they were --  
 11 13 05AM 11 pleadings are referred to that have come up before,  
 11 13 09AM 12 transcripts of various proceedings. But I have  
 11 13 12AM 13 spent quite a bit of time on the pleadings on this  
 11 13 17AM 14 motion already.

11 13 18AM 15 MR. KELLY: And I ask you, Judge, to take not  
 11 13 24AM 16 only to that brief statement that it's the  
 11 13 26AM 17 cumulative effect and the Court must determine  
 11 13 28AM 18 whether or not it impacted the due-process rights  
 11 13 32AM 19 of Mr. Ray in receiving a fair trial. And I  
 11 13 36AM 20 believe Ms. Seifter, who is the primary author of  
 11 13 38AM 21 this pleading, points out that many of the Arizona  
 11 13 41AM 22 cases cited refer to one, single instance of  
 11 13 45AM 23 misconduct. She has cited or outlined 10 specific  
 11 13 50AM 24 instances of misconduct.

11 13 51AM 25 I don't believe that that list is  
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11 13 53AM 1 exhaustive. I would ask the Court to consider its  
 11 13 57AM 2 own recollection of the facts as presented during  
 11 14 00AM 3 the course of this lengthy trial -- your own notes.  
 11 14 04AM 4 And I would submit, Judge, there are more or  
 11 14 06AM 5 greater than 10 instances of conduct which affected  
 11 14 10AM 6 Mr. Ray's ability to receive a fair trial. But we  
 11 14 13AM 7 have identified 10 important areas.

11 14 18AM 8 I also ask you, Judge, to consider the  
 11 14 20AM 9 reply. Because I think it's important to note that  
 11 14 25AM 10 it's incumbent upon the State of Arizona to prove  
 11 14 30AM 11 beyond a reasonable doubt that that misconduct did  
 11 14 31AM 12 not influence the verdict. And that burden cannot  
 11 14 34AM 13 be shifted to the defense, as alleged in the  
 11 14 37AM 14 pleadings, the response, filed by the state. That  
 11 14 40AM 15 burden lies squarely on the shoulders of the State  
 11 14 40AM 16 of Arizona.

11 14 44AM 17 And we've not heard an explanation or any  
 11 14 51AM 18 type of assertion by the State of Arizona that, in  
 11 14 54AM 19 fact, these repeated instances outlined in the  
 11 14 58AM 20 motion did not affect the verdict by the jury in  
 11 15 04AM 21 this case. There was, my recollection, one  
 11 15 08AM 22 response in that regard. And it's on page 1. It's  
 11 15 13AM 23 simply the conclusionary statement that the state  
 11 15 18AM 24 asserts did not affect the jury's verdict as there  
 11 15 19AM 25 was ample evidence of defendant's guilt.

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11 15 22AM 1 I would submit, Judge, that's inadequate  
 11 15 24AM 2 under Arizona law; that, in fact, it's necessary  
 11 15 26AM 3 for the state to prove beyond a reasonable doubt  
 11 15 28AM 4 that this misconduct did not affect the jury's  
 11 15 30AM 5 verdict.

11 15 36AM 6 Again, Judge, I believe the issue is  
 11 15 43AM 7 squarely on the Court that given your  
 11 15 47AM 8 interpretation of the evidence as presented, the  
 11 15 52AM 9 asserted misconduct by the State of Arizona -- and,  
 11 15 56AM 10 again, in the response of the pleading, there seems  
 11 15 59AM 11 to be explanations as to that misconduct. But  
 11 16 03AM 12 there doesn't seem to be a great deal of  
 11 16 06AM 13 disagreement that, in fact, it occurred.

11 16 08AM 14 So given that, Judge, again, I believe  
 11 16 10AM 15 it's squarely on the Court's shoulder to determine  
 11 16 13AM 16 whether or not that type of conduct affected  
 11 16 17AM 17 Mr. Ray's ability to receive a fair trial. My  
 11 16 23AM 18 answer, for what it's worth -- and it's not worth  
 11 16 26AM 19 anything because I'm not making the decision. But  
 11 16 28AM 20 my answer in that regard is absolutely it did. And  
 11 16 31AM 21 he did not receive a fair trial. And thus the  
 11 16 34AM 22 motion for a new trial must be granted.

11 16 36AM 23 I believe that's the decision for this  
 11 16 38AM 24 court -- and, again, I believe it's been well  
 11 16 40AM 25 briefed, argued, referenced, to the factual record.

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11 16 44AM 1 If you need supplementation, we have the entire  
 11 16 47AM 2 record, and we'd be happy to provide that.

11 16 50AM 3 THE COURT: Thank you, Mr. Kelly.

11 16 53AM 4 Ms. Polk.

11 16 56AM 5 MS. POLK: Thank you, Your Honor. Thank you,  
 11 16 58AM 6 Judge.

11 17 33AM 7 The state requests that this court deny  
 11 17 35AM 8 the defendant's motion for a new trial. By my  
 11 17 41AM 9 count, the defense has alleged 31 incidents that  
 11 17 45AM 10 they claim are prosecutorial misconduct. In the  
 11 17 49AM 11 pleading that was filed, there were, I believe, 10  
 11 17 52AM 12 categories. But within each of those 10 categories  
 11 17 55AM 13 there were subcategories. And the pleading also  
 11 17 58AM 14 incorporated by reference other pleadings they have  
 11 18 02AM 15 filed.

11 18 02AM 16 We've gone through all those categories.  
 11 18 04AM 17 We've gone through those other pleadings and come  
 11 18 07AM 18 up with 31 separate incidents that the defense  
 11 18 11AM 19 claims are prosecutorial misconduct. Each of those  
 11 18 14AM 20 31 incidents we responded to in our response that  
 11 18 18AM 21 we filed with the Court.

11 18 23AM 22 Of those 31 incidents there are three  
 11 18 26AM 23 errors. And those three errors are errors that the  
 11 18 31AM 24 state has readily admitted. And two of those three  
 11 18 31AM 25 errors this court has already addressed and

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11 18 33AM 1 appropriately, either sanctioned or given the jury  
 11 18 36AM 2 instructions.

11 18 38AM 3 And the third error is an error that  
 11 18 40AM 4 occurred in the aggravation closing. And I filed a  
 11 18 43AM 5 pleading addressing that. And I believe that that  
 11 18 45AM 6 error is harmless error. Of those 31 incidents  
 11 18 48AM 7 that the defense has alleged are prosecutorial  
 11 18 50AM 8 misconduct, I believe that there are only three  
 11 18 54AM 9 that are errors.

11 18 56AM 10 The first is the late disclosure of the  
 11 18 58AM 11 Haddow email. The second was my comment during my  
 11 19 03AM 12 closing argument during the guilt phase where I  
 11 19 06AM 13 asked the jury to draw an impermissible inference  
 11 19 10AM 14 from the audio clip of Kirby Brown that I had  
 11 19 14AM 15 played during the guilt phase.

11 19 17AM 16 The third error was my playing of a  
 11 19 20AM 17 portion of an audio during the aggravation closing  
 11 19 22AM 18 that had not been admitted. As I told you, the  
 11 19 25AM 19 state has readily admitted those three errors. And  
 11 19 28AM 20 two of those three errors were already addressed by  
 11 19 31AM 21 this court.

11 19 32AM 22 The remaining 28 incidents that the  
 11 19 34AM 23 defense claims constitute prosecutorial misconduct  
 11 19 38AM 24 are not even errors, Your Honor, let alone  
 11 19 43AM 25 prosecutorial misconduct. In fact, in this case

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11 19 45AM 1 this court did an outstanding job addressing issues  
 11 19 49AM 2 as they came up. The Court issued or read a number  
 11 19 52AM 3 of cautionary instructions at the defense's  
 11 19 56AM 4 request. In fact, I can only think of one instance  
 11 20 01AM 5 where the Court refused to read a cautionary  
 11 20 03AM 6 instruction.

11 20 03AM 7 The Court repeatedly warned the jury that  
 11 20 06AM 8 lawyers' comments are not evidence. The Court  
 11 20 10AM 9 ruled already on many of the issues that the  
 11 20 13AM 10 defense claims in this pleading are error. For all  
 11 20 16AM 11 those reasons, Your Honor, I believe this motion  
 11 20 18AM 12 for mistrial should be denied.

11 20 23AM 13 I do appreciate the time the Court has  
 11 20 26AM 14 set aside for oral argument on this issue because  
 11 20 29AM 15 it is going to take a considerable amount of time  
 11 20 31AM 16 for me to go through those 31 incidents. I  
 11 20 34AM 17 appreciate the fact that the Court has set aside  
 11 20 36AM 18 the remainder of the day for me to make a full  
 11 20 39AM 19 record of these incidents.

11 20 45AM 20 I want to start, Your Honor, by providing  
 11 20 47AM 21 the legal framework that I believe is the correct  
 11 20 50AM 22 framework for your review of the issues. And I  
 11 20 52AM 23 want to start by talking first about the relevant  
 11 20 54AM 24 cases. I do agree that Rule 24.1(c) of the Rules  
 11 20 58AM 25 of Criminal Procedure includes prosecutorial

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11:21:03AM 1 misconduct as a grounds upon which the Court can  
 11:21:06AM 2 grant a new trial.  
 11:21:08AM 3 We have reviewed many, many cases. And,  
 11:21:10AM 4 as Your Honor knows, that the defense cited a lot  
 11:21:12AM 5 of case. The state cited a lot of cases. And in  
 11:21:14AM 6 reviewing all of those cases, it's interesting to  
 11:21:16AM 7 note that the vast majority of those cases analyzed  
 11:21:18AM 8 errors found to be prosecutorial misconduct, but  
 11:21:20AM 9 found them to be harmless. And the majority of  
 11:21:22AM 10 those cases are not cases where the Court granted a  
 11:21:24AM 11 new trial.

11:21:26AM 12 Those cases set out a general framework  
 11:21:28AM 13 for this court to analyze a motion for new trial  
 11:21:30AM 14 based on allegations of prosecutorial misconduct.  
 11:21:32AM 15 And that analysis is, essentially, this: First,  
 11:21:34AM 16 the Court must find actual misconduct. And the  
 11:21:36AM 17 cases distinguish between misconduct as opposed to  
 11:21:38AM 18 mere legal errors. That would be the State versus  
 11:21:40AM 19 Minnitt case and the State versus Aguilar. Both of  
 11:21:42AM 20 those cases we cited in our response.

11:21:44AM 21 Second, if the Court finds that there was  
 11:21:46AM 22 misconduct as opposed to simply an error, the Court  
 11:21:48AM 23 must find that it was intentional conduct which the  
 11:21:50AM 24 prosecutor knew to be improper and prejudicial and  
 11:21:52AM 25 which the prosecutor pursued for an improper

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11:22:22AM 1 purpose with indifference to a significance  
 11:22:24AM 2 resulting danger of mistrial.

11:22:26AM 3 That's the standard set out in all the  
 11:22:28AM 4 cases and specifically in State versus Morris,  
 11:22:30AM 5 which we cited in our response. And then the cases  
 11:22:32AM 6 say that the Court shall look to objective factors  
 11:22:34AM 7 to determine misconduct, including the prosecutor's  
 11:22:36AM 8 explanation. And that's set out in the State  
 11:22:38AM 9 versus Trani case.

11:22:40AM 10 Third, the Court must analyze the impact  
 11:22:42AM 11 on the jury. State versus Morris case states that  
 11:22:44AM 12 to grant a new trial for prosecutorial misconduct,  
 11:22:46AM 13 the Court must find, quote, a reasonable likelihood  
 11:22:48AM 14 that misconduct could have affected the jury's  
 11:22:50AM 15 verdict and, therefore, denied the defendant a fair  
 11:22:52AM 16 trial.

11:22:54AM 17 The State versus Jones case, which I also  
 11:22:56AM 18 cited in our brief or in our memorandum states that  
 11:22:58AM 19 the conduct must be so egregious that it raises  
 11:23:00AM 20 concerns over the integrity and the fundamental  
 11:23:02AM 21 fairness of the trial itself.

11:23:04AM 22 And the State versus Hughes case states  
 11:23:06AM 23 that the conduct must be so pronounced and  
 11:23:08AM 24 persistent that it permeates the entire atmosphere  
 11:23:10AM 25 of the trial.

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11:23:34AM 1 The State versus Snyder case, which we  
 11:23:36AM 2 cited in the response, provides that courts must  
 11:23:38AM 3 consider the cautionary instructions and jury  
 11:23:40AM 4 instructions and must presume that jurors follow  
 11:23:42AM 5 the Judge's instructions in determining whether or  
 11:23:44AM 6 not conduct constitutes grounds for a new trial.  
 11:23:46AM 7 And, again, I would remind the Court of the number  
 11:23:48AM 8 of times that this court did give cautionary  
 11:23:50AM 9 instructions to the jury at the defendant's  
 11:23:52AM 10 request.

11:24:00AM 11 Your Honor, I disagree with two things  
 11:24:02AM 12 that Mr. Kelly said. He said that the parties  
 11:24:04AM 13 agreed that there are no issues regarding the law  
 11:24:06AM 14 or the facts. I disagree with that. We have a  
 11:24:08AM 15 number of disagreements with the pleadings filed by  
 11:24:10AM 16 the defense and what they set out as facts.

11:24:12AM 17 And, secondly, I disagree also with the  
 11:24:14AM 18 law. Mr. Kelly told you that the cases say that  
 11:24:16AM 19 the state must prove beyond a reasonable doubt that  
 11:24:18AM 20 the defendant did not suffer prejudice. And, in  
 11:24:20AM 21 fact, the State versus Hughes case, which is one of  
 11:24:22AM 22 the seminal cases in Arizona dealing with a new  
 11:24:24AM 23 trial for prosecutorial misconduct, specifically  
 11:24:26AM 24 states the following: And the cite for this  
 11:24:28AM 25 case -- and, again, it's cited in our response.

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11:24:51AM 1 The cite for the State versus Hughes case is 193  
 11:24:53AM 2 Ariz. 72.

11:24:55AM 3 And at page 79 the court -- the Arizona  
 11:24:57AM 4 Supreme Court wrote the following: To prevail on a  
 11:24:59AM 5 claim of prosecutorial misconduct, a defendant must  
 11:25:01AM 6 demonstrate that the prosecutor's misconduct so  
 11:25:03AM 7 infected the trial with unfairness as to make the  
 11:25:05AM 8 resulting conviction a denial of due process.

11:25:07AM 9 And our Arizona Supreme Court cites a  
 11:25:09AM 10 United States Supreme Court case for that quote.  
 11:25:11AM 11 And it's Donnelly versus de Christoforo.

11:25:13AM 12 So again, state versus Hughes, from the  
 11:25:15AM 13 Arizona Supreme Court, is clear that to prevail on  
 11:25:17AM 14 a claim of prosecutorial misconduct, a defendant  
 11:25:19AM 15 must demonstrate that the prosecutor's conduct so  
 11:25:21AM 16 infected the trial with unfairness as to make the  
 11:25:23AM 17 resulting conviction a denial of due process.

11:25:25AM 18 Then the Hughes court goes on to state  
 11:25:27AM 19 that a reversal on the basis of prosecutorial  
 11:25:29AM 20 misconduct requires that the conduct be so  
 11:25:31AM 21 pronounced and persistent that it permeates the  
 11:25:33AM 22 entire atmosphere of the trial.

11:25:35AM 23 Your Honor, it is undisputed that this  
 11:25:37AM 24 was a very lengthy trial and that it was a  
 11:25:39AM 25 contested trial. And I would like to quote to the

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11:26:20AM 1 Court from the State versus Snyder, which is in our  
 11:26:23AM 2 response, 148 Ariz. 441 at 447. This was a case  
 11:26:28AM 3 where the Court found that the conduct of the  
 11:26:33AM 4 prosecutor did not require a new trial.

11:26:38AM 5 And the Court stated, we note that  
 11:26:41AM 6 appellate complains of about 10 instances of  
 11:26:44AM 7 misconduct which occurred over a very lengthy and  
 11:26:47AM 8 hotly-contested trial. As to each incident the  
 11:26:50AM 9 trial court either admonished the prosecutor in  
 11:26:53AM 10 front of the jury or advised the jury to disregard  
 11:26:55AM 11 the prosecutor's remarks.

11:26:57AM 12 In none of the instances did the  
 11:27:01AM 13 prosecutor argue his personal belief of the  
 11:27:02AM 14 defendant's guilt nor did he call matters to the  
 11:27:04AM 15 attention of the jury, which they would not be  
 11:27:07AM 16 justified in considering in reaching their verdict.

11:27:09AM 17 It is clearly improper for a prosecutor  
 11:27:12AM 18 to thank a court for favorable rulings in response  
 11:27:15AM 19 to his objections. It is also improper for a  
 11:27:18AM 20 prosecutor to improperly argue the burden of proof.  
 11:27:22AM 21 However, these matters were cured by the Court's  
 11:27:25AM 22 instructions to the jury to disregard the remarks  
 11:27:28AM 23 of the prosecutor.

11:27:29AM 24 Given the length of the trial and the  
 11:27:31AM 25 Court's curative instructions, we conclude the  
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11:27:32AM 1 appellant was not prejudiced by the instances of  
 11:27:36AM 2 prosecutorial misconduct.

11:27:37AM 3 Again, Your Honor, the state has freely  
 11:27:39AM 4 admitted to three errors. We do not believe that  
 11:27:43AM 5 the 28 other incidents that the defense alleges  
 11:27:47AM 6 were errors were even errors. But to the extent  
 11:27:51AM 7 that the Court might consider that they were, the  
 11:27:54AM 8 record in this case is very strong that this court  
 11:27:57AM 9 responded to all the issues on a timely basis.

11:28:00AM 10 Again, the Court frequently gave  
 11:28:03AM 11 cautionary instructions when the defense requested  
 11:28:06AM 12 it. And the Court reminded the jury on many  
 11:28:10AM 13 occasions that lawyers' comments are not evidence.

11:28:14AM 14 In deciding -- in determining how to  
 11:28:17AM 15 approach the defendant's motion for new trial,  
 11:28:20AM 16 Your Honor, I think that the State versus Roque  
 11:28:22AM 17 case is a very good case to look at and to follow  
 11:28:26AM 18 that same approach. We cited State versus Roque in  
 11:28:30AM 19 our response. But the cite for State versus Roque  
 11:28:33AM 20 is 213 Ariz. 193. It's a 2006 death penalty case  
 11:28:40AM 21 in Arizona.

11:28:45AM 22 And in that case on a motion for new  
 11:28:49AM 23 trial, the defendant alleged 28 incidents of  
 11:28:51AM 24 prosecutorial misconduct claiming that combined  
 11:28:51AM 25 they denied him a fair trial.

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11:28:54AM 1 The Court in the Roque case states that  
 11:28:57AM 2 the first step is to review each alleged incident  
 11:29:00AM 3 to determine whether error occurred. The Court  
 11:29:03AM 4 then notes the possibility that the cumulative  
 11:29:06AM 5 effects of the errors even if each is harmless can  
 11:29:10AM 6 still contribute to a finding of persistent and  
 11:29:14AM 7 pervasive misconduct if the cumulative effect of  
 11:29:17AM 8 the incidents shows the prosecutor intentionally  
 11:29:23AM 9 engaged in improper conduct and did so with  
 11:29:27AM 10 indifference, if not specific intent to prejudice  
 11:29:28AM 11 the defendant.

11:29:29AM 12 In the Roque case the Court then reviewed  
 11:29:32AM 13 the 28 claims of prosecutorial misconduct. And the  
 11:29:36AM 14 Court found that many of them concerned properly  
 11:29:38AM 15 admitted evidence, questions with a sufficient  
 11:29:41AM 16 basis, accurate statements or reasonable arguments  
 11:29:45AM 17 from the facts, which I believe to be the case here  
 11:29:48AM 18 as well.

11:29:49AM 19 And in the end the Court in Roque found  
 11:29:52AM 20 that three of the incidents contributed to the  
 11:29:55AM 21 overall assessment of cumulative prosecutorial  
 11:29:59AM 22 misconduct. But the Court found that the  
 11:30:02AM 23 cumulative effect of those three errors did not,  
 11:30:05AM 24 quote, permeate the entire atmosphere of the trial  
 11:30:08AM 25 with unfairness so as to deny Mr. Roque due  
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11:30:13AM 1 process.

11:30:14AM 2 In the Roque case the three errors that  
 11:30:17AM 3 the Arizona Supreme Court found were, one, that the  
 11:30:22AM 4 prosecutors had testified as to the validity of  
 11:30:24AM 5 tests; second, that the prosecutors had asked the  
 11:30:27AM 6 defense expert harassing and unfounded questions.  
 11:30:30AM 7 And the third was that the prosecutors had failed  
 11:30:34AM 8 to disclose the extent the state's expert testimony  
 11:30:37AM 9 on the central issue in the case.

11:30:40AM 10 And I think the Court will recall that  
 11:30:42AM 11 the State versus Roque case came up early on in  
 11:30:45AM 12 this matter when the defense had done a request for  
 11:30:48AM 13 the December 14 notes of the prosecutors. But in  
 11:30:52AM 14 that case, even with the issue that had occurred in  
 11:30:55AM 15 the Roque case, the Court found that none of the  
 11:30:57AM 16 those three errors was sufficient alone or  
 11:31:01AM 17 cumulatively to require a motion for -- or to  
 11:31:06AM 18 require a new trial.

11:31:14AM 19 So, again, Your Honor, I believe that  
 11:31:16AM 20 Roque is a good example or a good framework to use  
 11:31:20AM 21 in analyzing the motion in this case, first, by  
 11:31:25AM 22 reviewing each incident that the defendant claims  
 11:31:28AM 23 is misconduct to determine whether it's error at  
 11:31:32AM 24 all.

11:31:32AM 25 Second, if error is found, to determine  
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11:31:35AM 1 whether or not the error was harmless. And, third,  
 11:31:42AM 2 if not, to determine whether or not it was  
 11:31:49AM 3 prosecutorial misconduct. And then, four, even if  
 11:31:56AM 4 each alone does not merit a new trial, the Court  
 11:31:52AM 5 must look at the cumulative effect to determine  
 11:31:57AM 6 whether or not cumulatively the errors deprived the  
 11:31:59AM 7 defendant of the fair trial.

11:32:00AM 8 And that's the reason, Your Honor, that I  
 11:32:01AM 9 do appreciate the Court giving the state a lengthy  
 11:32:06AM 10 period of time. Because I believe looking at these  
 11:32:08AM 11 cases, the correct way to analyze a motion for new  
 11:32:13AM 12 trial is to examine each one of the alleged  
 11:32:16AM 13 incidents, determine whether or not there was  
 11:32:19AM 14 error, determine whether or not there was  
 11:32:20AM 15 prosecutorial misconduct, determine whether or not  
 11:32:23AM 16 it was harmless, and determine whether or not there  
 11:32:25AM 17 is a cumulative effect that together denies the  
 11:32:28AM 18 defendant -- denied the defendant a fair trial.

11:32:33AM 19 In this case, as I've already stated, we  
 11:32:36AM 20 found that the defense has alleged 31 separate  
 11:32:40AM 21 incidents. Of those 31, I concede, I believe, the  
 11:32:44AM 22 state has freely admitted as to three errors. And  
 11:32:47AM 23 the remaining 28, Your Honor, I do not believe are  
 11:32:51AM 24 errors at all.

11:33:01AM 25 I think in examining the incidents that  
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11:33:04AM 1 the defense has put forward as errors in  
 11:33:07AM 2 prosecutorial misconduct, it bears taking a few  
 11:33:11AM 3 moments to talk about the State versus Hughes case,  
 11:33:14AM 4 which is the case I just cited to the Court, which  
 11:33:18AM 5 states that it's the defendant who must demonstrate  
 11:33:21AM 6 that the prosecutor's misconduct so infected the  
 11:33:24AM 7 trial as to deny the defendant a fair trial.

11:33:29AM 8 In Roque the Roque court actually looked  
 11:33:33AM 9 at the Hughes case for guidance. And in Roque the  
 11:33:38AM 10 supreme court called the State versus Hughes case  
 11:33:41AM 11 "a masterpiece of misconduct," and in Hughes had  
 11:33:47AM 12 found that the cumulative effect of seven incidents  
 11:33:49AM 13 of prosecutorial misconduct did deny the defendant  
 11:33:52AM 14 a fair trial.

11:33:54AM 15 I think it's instructive to examine the  
 11:33:58AM 16 Hughes case and use it as a guide against which to  
 11:34:01AM 17 measure the conduct that the defendant alleges in  
 11:34:05AM 18 this case was prosecutorial misconduct.

11:34:10AM 19 In the Hughes case the misconduct  
 11:34:12AM 20 includes the prosecutor in opening statement to the  
 11:34:17AM 21 jury told the jury there was no mental illness in  
 11:34:23AM 22 the case even though the prosecutor knew that all  
 11:34:26AM 23 six of the doctors who had examined the defendant  
 11:34:28AM 24 between the arrest and trial had found the  
 11:34:28AM 25 defendant to be mentally ill, and even though the

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11:34:33AM 1 prosecutor knew that the defendant's competence for  
 11:34:36AM 2 trial had been extensively litigated, including a  
 11:34:39AM 3 special action on the issue, including the  
 11:34:42AM 4 defendant going to restoration for competency  
 11:34:48AM 5 before the trial could proceed, and including an  
 11:34:49AM 6 actual reversal of the trial court's ruling that  
 11:34:52AM 7 the defendant was competent. In spite of all that,  
 11:34:55AM 8 in the prosecutors's statement he told the jury  
 11:35:00AM 9 there was no mental illness in the case.

11:35:02AM 10 The second incident that the Court found  
 11:35:05AM 11 to be misconduct in the Hughes case was when the  
 11:35:09AM 12 prosecutor did the cross-examination of an expert  
 11:35:12AM 13 medical doctor witness. And in that included  
 11:35:14AM 14 several leading questions that gave information to  
 11:35:17AM 15 the jury that the Court had already expressly  
 11:35:20AM 16 precluded.

11:35:22AM 17 The third act that the Court found to be  
 11:35:25AM 18 prosecutorial misconduct occurred in the rebuttal  
 11:35:28AM 19 closing arguments, which the Court in the Hughes --  
 11:35:31AM 20 which the Arizona Supreme Court in the Hughes case  
 11:35:34AM 21 does describe as a masterpiece of misconduct.

11:35:38AM 22 In that rebuttal closing the prosecutor  
 11:35:41AM 23 argued that the psychiatrist created excuses for  
 11:35:44AM 24 criminals. They argued that the defense attorney  
 11:35:47AM 25 had paid the psychiatrist to fabricate a diagnosis.

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11:35:52AM 1 They argued that the psychiatrists were mouthpieces  
 11:35:55AM 2 for the defendant. They told the jury again about  
 11:35:58AM 3 the Rule 11 proceedings even though the Court had  
 11:36:01AM 4 precluded that information. The prosecutor  
 11:36:04AM 5 improperly commented on the defendant's failure to  
 11:36:08AM 6 testify and stated that the defendant had lied to  
 11:36:11AM 7 the psychiatrist. And, finally, the prosecutor  
 11:36:14AM 8 improperly appealed to the jury's fear that the  
 11:36:17AM 9 defendant would kill again if they acquitted him.

11:36:21AM 10 So it's within that framework -- those  
 11:36:24AM 11 are examples of prosecutorial conduct so extreme,  
 11:36:30AM 12 so egregious, that the Arizona Supreme Court has  
 11:36:33AM 13 granted a new trial based on prosecutorial  
 11:36:35AM 14 misconduct.

11:36:35AM 15 But I hold that case out for the Court  
 11:36:38AM 16 because I think it's a good measure of the cases  
 11:36:43AM 17 where the Court does find prosecutorial misconduct,  
 11:36:48AM 18 does find it warrants a new trial, to measure  
 11:36:49AM 19 against the incidents that the defense alleges in  
 11:36:53AM 20 this case are errors and prosecutorial misconduct.

11:36:55AM 21 And I think what the Court will find is  
 11:36:58AM 22 that none of the incidents that the defendants  
 11:37:03AM 23 allege are grounds in this case to grant a new  
 11:37:05AM 24 trial on.

11:37:09AM 25 And the final analysis, Your Honor, the  
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11:37:12AM 1 state in this case never engaged in any conduct  
 11:37:14AM 2 that can be fairly characterized as, quote,  
 11:37:18AM 3 intentional conduct which the prosecutor knows to  
 11:37:20AM 4 be improper and prejudicial and which we pursued  
 11:37:22AM 5 for any improper purpose with indifference to a  
 11:37:24AM 6 significant resulting danger of mistrial. Again,  
 11:37:26AM 7 the test to define "prosecutorial misconduct."  
 11:37:28AM 8  
 11:37:30AM 9 As I've already stated, Your Honor, we  
 11:37:32AM 10 have freely admitted to the mistakes that we made  
 11:37:34AM 11 over this protracted court proceeding. And there  
 11:37:36AM 12 are three of them. Upon learning of each of the  
 11:37:38AM 13 mistakes, the state timely and in a forthright  
 11:37:40AM 14 manner brought the mistakes to the attention of the  
 11:37:42AM 15 Court and counsel, or when they were brought to our  
 11:37:44AM 16 attention, we freely admitted them.

11:37:46AM 17 I want to start, Your Honor -- I've said  
 11:37:48AM 18 there is three. And I want to start with what I  
 11:37:50AM 19 call the "aggravation closing arguments error." As  
 11:37:52AM 20 the Court will recall, I freely admitted that I  
 11:37:54AM 21 made that error during my closing argument during  
 11:37:56AM 22 the aggravation phase and that, in fact, I'm the  
 11:37:58AM 23 one that filed the pleading bringing it to the  
 11:38:00AM 24 Court's attention when we discovered the error.

11:38:02AM 25 I want to address the error itself,  
 11:38:04AM  
 11:38:06AM Your Honor, and then I want to address what the  
 11:38:08AM  
 11:38:10AM Mina G. Hunt (928) 554-8522

11:38:12AM 1 defense wrote in their motion for new trial,  
 11:38:14AM 2 because I think there is some confusion. And  
 11:38:16AM 3 what's written in the motion for new trial is  
 11:38:18AM 4 simply inaccurate.  
 11:38:20AM 5  
 11:38:22AM 6 So first I want to discuss the error.  
 11:38:24AM 7 And that's when during my closing arguments in the  
 11:38:26AM 8 aggravation phase of this trial, I played a portion  
 11:38:28AM 9 of an audio clip I believed was included in audio  
 11:38:30AM 10 clip Exhibit 744. But then I later discovered it  
 11:38:32AM 11 was not.

11:38:34AM 12 In the defendant's motion he confuses  
 11:38:36AM 13 audio clip Exhibit 744 with audio clip 734. And  
 11:38:38AM 14 that's the confusion I'll address in a moment. But  
 11:38:40AM 15 first I want to address the error itself.  
 11:38:42AM 16 Exhibit 744 was admitted at trial. And I played  
 11:38:44AM 17 the entire clip for the jury during the guilt phase  
 11:38:46AM 18 of the trial during the testimony of Jennifer  
 11:38:48AM 19 Haley. There was no error at that time.

11:38:50AM 20 I played what I believed to be  
 11:38:52AM 21 Exhibit 744 again to the jury during the  
 11:38:54AM 22 aggravation hearing closing arguments but at that  
 11:38:56AM 23 time erroneously played about an extra minute that  
 11:38:58AM 24 was not included in admitted Exhibit 744.

11:39:00AM 25 When I later learned I had done this, I  
 11:39:02AM  
 11:39:04AM filed with the Court the notice of the error and  
 11:39:06AM  
 11:39:08AM Mina G. Hunt (928) 554-8522

11:40:05AM 1 brought the error to the Court's attention. I  
 11:40:07AM 2 regret that I made that error. It was not done  
 11:40:09AM 3 intentionally. And it was certainly not done for  
 11:40:11AM 4 any -- knowingly done for any improper purpose.

11:40:13AM 5 But I wanted to make sure the record is  
 11:40:15AM 6 clear on exactly what the mistake was. Because the  
 11:40:17AM 7 defendant's motion there is confusion between those  
 11:40:19AM 8 two exhibits.

11:40:21AM 9 And, Your Honor, I did have marked as an  
 11:40:23AM 10 exhibit for the Court, and I provided counsel with  
 11:40:25AM 11 a copy. This is Exhibit 137. If I can show it to  
 11:40:27AM 12 the Court.

11:41:09AM 13 Your Honor, does counsel have an  
 11:41:11AM 14 objection to my moving to admit Exhibit 1137 for  
 11:41:13AM 15 purposes of this argument?

11:41:15AM 16 MR. KELLY: No objection.

11:41:17AM 17 MS. POLK: Thank you.

11:41:19AM 18 THE COURT: 1137 is admitted for this  
 11:41:21AM 19 proceeding.

11:41:23AM 20 (Exhibit 1137 admitted.)

11:41:25AM 21 MS. POLK: Thank you, Your Honor. What  
 11:41:27AM 22 Exhibit 1137 shows us is the Exhibit 744, which  
 11:41:29AM 23 would be the portion that is not highlighted. What  
 11:41:31AM 24 is in yellow is the additional portion of the audio  
 11:41:33AM 25 clip that I mistakenly played for the jury during  
 11:41:35AM  
 11:41:37AM Mina G. Hunt (928) 554-8522

11:41:42AM 1 my argument in aggravation phase closing.  
 11:41:44AM 2 To be clear, Your Honor, the yellow  
 11:41:46AM 3 portion was unadmitted. The next paragraph that is  
 11:41:48AM 4 not highlighted was admitted in Exhibit 744 and  
 11:41:50AM 5 played in my aggravation closing. And then the  
 11:41:52AM 6 next paragraph below is also part of the admitted  
 11:41:54AM 7 Exhibit 744. But I did not play that portion in my  
 11:41:56AM 8 aggravation closing.

11:42:00AM 9 Again, Your Honor, I fully admit to this  
 11:42:02AM 10 error. I brought it to the Court's attention when  
 11:42:04AM 11 we discovered it. But this error clearly does not  
 11:42:06AM 12 constitute prosecutorial misconduct mandating a new  
 11:42:08AM 13 trial for several reasons.

11:42:10AM 14 First, the test to determine whether this  
 11:42:12AM 15 error constitutes prosecutorial misconduct is  
 11:42:14AM 16 whether the conduct was intentional conduct which  
 11:42:16AM 17 the prosecutors knew to be improper and prejudicial  
 11:42:18AM 18 and which he pursued for an improper purpose.

11:42:20AM 19 There needs to be a showing that the  
 11:42:22AM 20 error was clearly so egregious that it raises  
 11:42:24AM 21 concerns over the integrity and fundamental  
 11:42:26AM 22 fairness of the trial itself or that it permeated  
 11:42:28AM 23 the entire atmosphere of the trial.

11:43:04AM 24 And, third, there needs to be a showing  
 11:43:06AM 25 of a reasonable likelihood that the misconduct  
 11:43:08AM  
 11:43:10AM Mina G. Hunt (928) 554-8522



11:43:09AM 1 could have affected the jury's verdict, thereby  
 11:43:12AM 2 denying the defendant a fair trial.

11:43:15AM 3 That test is clearly not met here.

11:43:20AM 4 First, I did not intentionally commit this error.

11:43:25AM 5 Second, I did not knowingly commit the error for an  
 11:43:28AM 6 improper purpose. And, third, the error was  
 11:43:31AM 7 clearly not so egregious that it raises concerns  
 11:43:34AM 8 over the fundamental fairness of the trial itself.

11:43:37AM 9 To be clear, the error was committed only  
 11:43:40AM 10 in the aggravation phase, not in the guilt phase of  
 11:43:43AM 11 the trial. And there has been no showing of a  
 11:43:46AM 12 reasonable likelihood that the error could have  
 11:43:49AM 13 affected the jury's verdict in the aggravation  
 11:43:52AM 14 phase, especially given the following facts:

11:43:55AM 15 I played that unadmitted audio clip in  
 11:43:58AM 16 arguing the aggravating circumstance of pecuniary  
 11:44:01AM 17 gain to the jury. The jury, as you know, did not  
 11:44:04AM 18 return a verdict finding the state had proven that  
 11:44:07AM 19 aggravating circumstance of pecuniary gain.

11:44:10AM 20 So the purpose for which I played that  
 11:44:13AM 21 unadmitted portion was to prove pecuniary gain to  
 11:44:16AM 22 the jury, and the jury did not return a verdict  
 11:44:19AM 23 finding that as an aggravating factor.

11:44:22AM 24 Furthermore, as you can see, Your Honor,  
 11:44:25AM 25 from reading this transcript, the reference to the  
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11:44:28AM 1 audio clip that I played is to the investment that  
 11:44:31AM 2 the participants made to be at spiritual warrior.

11:44:34AM 3 And even if this court were to find the  
 11:44:37AM 4 error rises to the level of prosecutorial  
 11:44:40AM 5 misconduct, the record is clear that the playing of  
 11:44:43AM 6 the one minute of the unadmitted audio constitutes  
 11:44:46AM 7 harmless error.

11:44:49AM 8 I want to make a record of the fact,  
 11:44:52AM 9 Your Honor, that there was other ample evidence of  
 11:44:55AM 10 the fact of the investments admitted at trial and  
 11:44:58AM 11 in multiple forms. Similar words by the defendant  
 11:45:01AM 12 are contained in Exhibit 745, which was admitted at  
 11:45:04AM 13 trial and was also played for the jury and the  
 11:45:07AM 14 state's closing arguments during the aggravation  
 11:45:10AM 15 hearing.

11:45:13AM 16 Specifically, the jury heard in  
 11:45:16AM 17 Exhibit 745 that the defendant reminded the  
 11:45:19AM 18 participants on Sunday that they had invested a lot  
 11:45:22AM 19 of time and money to be there and they should not  
 11:45:25AM 20 waste time sleeping.

11:45:28AM 21 Melinda Martin testified on March 23 of  
 11:45:31AM 22 2011 and told the jury that the defendant had said  
 11:45:34AM 23 in order to have breakthroughs, you must have  
 11:45:37AM 24 breakdowns. And that language is contained in the  
 11:45:40AM 25 unadmitted portion.

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11:45:43AM 1 Testimony of the participants established  
 11:45:46AM 2 the amount of the investments they had made to  
 11:45:49AM 3 attend Spiritual Warrior in 2009. Exhibit 138, the  
 11:45:52AM 4 Spiritual Warrior brochure, indicates the  
 11:45:55AM 5 investment to attend Spiritual Warrior was \$9,695.  
 11:45:58AM 6 And that was admitted. The client files of Kirby  
 11:46:01AM 7 Brown and James Shore that were also admitted  
 11:46:04AM 8 indicate the amount that they paid to attend.

11:46:07AM 9 And through the testimony of many  
 11:46:10AM 10 witnesses, the jury heard how the defendant had  
 11:46:13AM 11 talked to them about breakthroughs, that they were  
 11:46:16AM 12 uncomfortable and that he promised them  
 11:46:19AM 13 breakthroughs through the events of the week. All  
 11:46:22AM 14 of that is information consistent, Your Honor, with  
 11:46:25AM 15 the unadmitted portion that I erroneously played  
 11:46:28AM 16 for the jury.

11:46:31AM 17 With regard to this error, the defendant  
 11:46:34AM 18 can show no prejudice, and there is none. I would  
 11:46:37AM 19 cite the Court to State versus Morris. It is in  
 11:46:40AM 20 our response. And the cite is 215 Ariz. 324. And  
 11:46:43AM 21 in that case the prosecutor argued to the jury  
 11:46:46AM 22 during the aggravation phase that the defendant had  
 11:46:49AM 23 murdered the victims in order to have sexual  
 11:46:52AM 24 intercourse with them. The defendant disputed that  
 11:46:55AM 25 inference and argued prosecutorial misconduct.

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11:47:03AM 1 The Court found that there was sufficient  
 11:47:06AM 2 evidence upon which to make that argument. And  
 11:47:09AM 3 then the Court went on to find that if it was  
 11:47:12AM 4 error, it was harmless, for the reasons that I've  
 11:47:15AM 5 already submitted to the Court in this case.

11:47:18AM 6 It was harmless because the prosecutor's  
 11:47:21AM 7 arguments were directed toward establishing only  
 11:47:24AM 8 the heinous and depraved prong of the F-6  
 11:47:27AM 9 aggravator. And the jury had found each murder was  
 11:47:30AM 10 committed in an especially cruel manner. And that  
 11:47:33AM 11 alone is sufficient to establish the F-6  
 11:47:36AM 12 aggravator.

11:47:39AM 13 Also in the Morris case, in addressing a  
 11:47:42AM 14 different error by the prosecutor in his rebuttal  
 11:47:45AM 15 closing arguments, again at the aggravation hearing  
 11:47:48AM 16 the Court found error but that the defendant could  
 11:47:51AM 17 show no prejudice from the error.

11:47:54AM 18 That error the Court did find had  
 11:47:57AM 19 occurred in the prosecutor's closing during the  
 11:48:00AM 20 aggravation phase occurred when the prosecutor  
 11:48:03AM 21 invited the jurors to put themselves in the place  
 11:48:06AM 22 of the victims and singled out specific jurors  
 11:48:09AM 23 based on appearance and gender.

11:48:12AM 24 The Court found that that was error. But  
 11:48:15AM 25 The Court further found that the defendant could

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11:48:14AM 1 not establish prejudice and, therefore, that that  
 11:48:17AM 2 was harmless. And that's on page 338 of the Morris  
 11:48:21AM 3 decision.

11:48:24AM 4 Back to this case. In this case the  
 11:48:27AM 5 unadmitted portion of the audio not played -- was  
 11:48:28AM 6 not played for the jury during the guilt phase. So  
 11:48:31AM 7 clearly this error does not affect the guilt phase  
 11:48:35AM 8 of this trial at all. I played that unadmitted  
 11:48:37AM 9 portion only during my argument during the  
 11:48:39AM 10 aggravation phase closing arguments.

11:48:44AM 11 Again, I played that clip to support the  
 11:48:47AM 12 aggravating circumstance of pecuniary gain. The  
 11:48:50AM 13 jury found that the state -- the jury did not  
 11:48:54AM 14 return a verdict finding that aggravating  
 11:48:56AM 15 circumstance of pecuniary gain.

11:48:59AM 16 And, as you will recall, the jury found  
 11:49:01AM 17 only that specifically enumerated aggravated  
 11:49:05AM 18 circumstance of emotional harm to the victims'  
 11:49:07AM 19 families. Clearly the clip that I erroneously  
 11:49:11AM 20 played had no effect on the determination of that  
 11:49:14AM 21 aggravating circumstance found by the jury.

11:49:17AM 22 The only additional aggravating  
 11:49:19AM 23 circumstance found by the jury was that the  
 11:49:21AM 24 defendant was in a unique position of trust with  
 11:49:24AM 25 victim Lizbeth Neuman. And, again, that unadmitted  
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11:49:29AM 1 portion that I erroneously played did not address  
 11:49:32AM 2 that unique position of trust, had no impact on the  
 11:49:35AM 3 guilt phase and no impact on the determination of  
 11:49:38AM 4 the aggravating circumstance of emotional harm in  
 11:49:41AM 5 the aggravation phase.

11:49:47AM 6 Judge, I just want to take a few moments  
 11:49:49AM 7 to address what appears to me to be confusion  
 11:49:52AM 8 between Exhibit 744, that we just talked about --  
 11:49:56AM 9 that's the audio clip -- and Exhibit 734, which is  
 11:50:02AM 10 another audio clip.

11:50:03AM 11 I played both of those in my aggravation  
 11:50:07AM 12 closing. When I played clips from Exhibit 734, as  
 11:50:14AM 13 I recall, the defense objected and claimed that  
 11:50:18AM 14 Exhibit 734 had not been admitted. It clearly has  
 11:50:22AM 15 been, Your Honor.

11:50:23AM 16 When the aggravation phase was over, as  
 11:50:25AM 17 you will recall, after the jury had returned the  
 11:50:28AM 18 verdict, I was accused of misrepresenting to the  
 11:50:32AM 19 Court that all of the audios on Exhibit 734 had  
 11:50:37AM 20 been admitted. And I had made that avowal to the  
 11:50:41AM 21 Court on March 2.

11:50:45AM 22 I'll make that avowal again that all of  
 11:50:51AM 23 the audio clips on Exhibit 734 were played during  
 11:50:57AM 24 my opening. And they are on Exhibit 734, which  
 11:50:57AM 25 this court admitted on March 2nd during the guilt

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11:51:01AM 1 phase.

11:51:02AM 2 I submitted to this court a pleading  
 11:51:04AM 3 where we provided for you a comparison of all of  
 11:51:09AM 4 the audio clips that are on Exhibit 734 and  
 11:51:13AM 5 provided the time stamp where each of those audio  
 11:51:18AM 6 clips was played in my opening arguments.

11:51:21AM 7 We provided the Court the tapes from both  
 11:51:24AM 8 the -- for the record audio that this court  
 11:51:28AM 9 maintains. And the defense had provided the Court  
 11:51:32AM 10 with videotape that the media had provided to them.  
 11:51:37AM 11 And we reviewed both of those. We provided the  
 11:51:41AM 12 Court with a time stamp where each and every single  
 11:51:43AM 13 one of those clips that are on Exhibit 734 were  
 11:51:47AM 14 played during my opening statement.

11:51:53AM 15 I believe perhaps, Your Honor, that the  
 11:51:55AM 16 defense -- the confusion is between Exhibit 744,  
 11:52:00AM 17 which was not played in my opening, which was later  
 11:52:03AM 18 admitted during trial -- and that's where I made  
 11:52:05AM 19 the error in playing a portion of it during my  
 11:52:09AM 20 aggravation close. I believe there is some  
 11:52:10AM 21 confusion between that and Exhibit 734. I hope  
 11:52:14AM 22 that I've been able to make a record and clear up  
 11:52:17AM 23 that confusion.

11:52:24AM 24 Your Honor, I want to move on to the  
 11:52:26AM 25 second error that the state made in this case. And  
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11:52:29AM 1 that was our late disclosure of the Haddow email.  
 11:52:36AM 2 But I do want to address some statements made in  
 11:52:38AM 3 the defendant's motion for new trial because I  
 11:52:42AM 4 believe those statements are inaccurate.

11:52:44AM 5 On page 7, lines 12 to 14, of defendant's  
 11:52:48AM 6 motion they wrote, quote, the ruling pertained to  
 11:52:52AM 7 the state's failure to disclose, despite four  
 11:52:56AM 8 expressed requests by the defense, the report of  
 11:52:58AM 9 environmental consultant Richard Haddow which  
 11:53:04AM 10 identified alternative causes of deaths and  
 11:53:07AM 11 suggested persons other than Mr. Ray might be  
 11:53:09AM 12 culpable.

11:53:11AM 13 The state does not dispute that we made  
 11:53:14AM 14 an error when we failed to timely disclose that  
 11:53:18AM 15 Haddow email. We admitted it at the time that the  
 11:53:21AM 16 state made the motion for mistrial. We've never  
 11:53:24AM 17 denied it, Your Honor. And we continue to admit it  
 11:53:27AM 18 today.

11:53:29AM 19 The Court dealt with that issue  
 11:53:31AM 20 appropriately and timely and has made a very good  
 11:53:35AM 21 record of that issue and the sanctions that this  
 11:53:39AM 22 court imposed.

11:53:43AM 23 And, as the Court knows, the defense used  
 11:53:46AM 24 our disclosure violation during trial to question  
 11:53:49AM 25 witnesses and to inform the jury, without this

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11:53:52AM 1 court's permission, that the state had been  
 11:53:54AM 2 sanctioned as a result of that conduct.  
 11:53:58AM 3 I don't want to spend time here,  
 11:54:01AM 4 Your Honor, rehashing the facts surrounding the  
 11:54:04AM 5 Haddow email. But the State versus Trani case,  
 11:54:07AM 6 which I have already quoted to the Court and which  
 11:54:09AM 7 is in our response, says that the Court shall  
 11:54:12AM 8 consider the prosecutor's explanation in  
 11:54:15AM 9 determining whether or not an error amounts to  
 11:54:18AM 10 prosecutorial misconduct.

11:54:20AM 11 And so I do need to spend a little bit of  
 11:54:23AM 12 time to refute what I believe to be misstatements  
 11:54:26AM 13 in the defense's motion for new trial. And I want  
 11:54:30AM 14 to make a full record of those issues.

11:54:34AM 15 The late disclosure of the Haddow email,  
 11:54:37AM 16 I believe as we've made a record before, is not  
 11:54:41AM 17 intentional. Again, it was not conduct that the  
 11:54:43AM 18 state knowingly engaged in knowing it to be  
 11:54:45AM 19 improper and prejudicial. We did not possess an  
 11:54:48AM 20 indifference to the danger of a mistrial.

11:54:51AM 21 To the contrary, when the issue surfaced,  
 11:54:53AM 22 we took it very seriously. And there is no  
 11:54:56AM 23 reasonable likelihood that the late disclosure  
 11:55:00AM 24 affected the jury's verdict or denied the defendant  
 11:55:04AM 25 a fair trial.

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11:55:05AM 1 Your Honor, the parties have quibbled --  
 11:55:07AM 2 and I want to make a record. In the defendant's  
 11:55:11AM 3 motion they call it a "report." I know that the  
 11:55:16AM 4 Court is aware that it was an email. And we made a  
 11:55:20AM 5 record of that on numerous occasions.

11:55:23AM 6 Furthermore, I do not believe that that  
 11:55:26AM 7 preliminary report or preliminary email identifies  
 11:55:30AM 8 alternative causes of death, as is written in the  
 11:55:33AM 9 defense's pleading. I believe that a review of the  
 11:55:37AM 10 email reveals that it identifies contributing  
 11:55:41AM 11 facts, including carbon dioxide, the amount of the  
 11:55:45AM 12 heat, the humidity -- all factors that are  
 11:55:48AM 13 controlled by the defendant. But they identify  
 11:55:52AM 14 those as contributing factors, not as alternative  
 11:55:56AM 15 causes of death. The email does.

11:55:59AM 16 I don't want to argue about it,  
 11:56:01AM 17 Your Honor. I just want to make a record. I  
 11:56:03AM 18 believe that that email does speak for itself.

11:56:05AM 19 The defense on page 7 of their pleading  
 11:56:10AM 20 wrote, and I -- that the state has exhibited, I  
 11:56:14AM 21 quote, a reckless indifference to the truth. And  
 11:56:18AM 22 that's on page 7 of their motion. And that's in  
 11:56:23AM 23 connection with the Haddow email issue.

11:56:27AM 24 The state disputes that characterization  
 11:56:27AM 25 of our conduct in this case. We have never

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11:56:31AM 1 displayed a reckless indifference to the truth. As  
 11:56:35AM 2 we clearly explained in our pleadings that were  
 11:56:37AM 3 filed at the time that the Haddow email surfaced,  
 11:56:43AM 4 and as Mr. Haddow clearly explained to the defense  
 11:56:46AM 5 attorneys when they interviewed him on April 15 of  
 11:56:48AM 6 2001, Mr. Haddow had been hired by attorneys in the  
 11:56:54AM 7 civil litigation.

11:56:55AM 8 In that interview he freely admits that  
 11:56:58AM 9 he contacted Detective Diskin on several occasions  
 11:57:02AM 10 trying to get information from Detective Diskin for  
 11:57:04AM 11 his own investigation in the civil litigation. He  
 11:57:08AM 12 freely admits in that interview with the defense  
 11:57:12AM 13 attorneys that he was hoping that the state would  
 11:57:13AM 14 hire him, and that he was undertaking measures to  
 11:57:19AM 15 get us to hire him. And he admits that he emailed  
 11:57:23AM 16 his preliminary opinions to our detective on  
 11:57:25AM 17 April 29 of 2010.

11:57:28AM 18 We've already made a record, Your Honor,  
 11:57:30AM 19 of the fact that the state then listed Mr. Haddow  
 11:57:33AM 20 in anticipation of hiring him, and we anticipated  
 11:57:36AM 21 that we would have him do a report if we hired him.  
 11:57:38AM 22 We've made a full record of the fact that we never  
 11:57:42AM 23 did retain him. We never did pay him any money.

11:57:45AM 24 And when the prosecutors interviewed him  
 11:57:48AM 25 on June 30 of 2010, we had concerns about his

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11:57:51AM 1 qualifications and made the determination not to  
 11:57:55AM 2 call him as a witness -- as an expert witness and  
 11:57:58AM 3 removed him from our list.

11:58:01AM 4 On page 7 of the defendant's motion for  
 11:58:04AM 5 new trial, lines 27 to 28, it is written, I quote,  
 11:58:10AM 6 Mr. Haddow's records revealed the state's  
 11:58:13AM 7 relationship with Mr. Haddow dated back to  
 11:58:15AM 8 October 2009 and involved numerous telephone  
 11:58:19AM 9 conversations and an extensive in-person meeting.  
 11:58:23AM 10 And they referred to the defendant's motion for  
 11:58:25AM 11 sanctions.

11:58:28AM 12 I want to address that if that language  
 11:58:31AM 13 were to be construed to suggest that the state had  
 11:58:33AM 14 a more extensive relationship with Mr. Haddow than  
 11:58:37AM 15 I've just revealed to the Court, then that would be  
 11:58:39AM 16 a mischaracterization. As I've made clear, it was  
 11:58:42AM 17 Mr. Haddow -- there were numerous contacts between  
 11:58:46AM 18 Mr. Haddow and the detective. That's because  
 11:58:49AM 19 Mr. Haddow was trying to get information from the  
 11:58:51AM 20 detective to complete his investigation in the  
 11:58:52AM 21 civil case.

11:58:54AM 22 The -- as I've just made clear to the  
 11:58:56AM 23 Court, the prosecutors interviewed Mr. Haddow on  
 11:58:59AM 24 the one occasion, had concerns about his  
 11:59:01AM 25 qualifications, and made the decision ultimately

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11:59:04AM 1 not to call him as an expert witness.  
 11:59:08AM 2 So to the extent that that -- what is  
 11:59:11AM 3 written on page 7 on the motion for new trial  
 11:59:14AM 4 suggests that the state has been misleading, that  
 11:59:17AM 5 we had a more extensive relationship with  
 11:59:22AM 6 Mr. Haddow, we simply did not.  
 11:59:25AM 7 I believe that a review of the transcript  
 11:59:28AM 8 of Mr. Haddow's interview by the defense attorneys,  
 11:59:31AM 9 which the defense attorneys did submit to the Court  
 11:59:34AM 10 attached to a pleading, that that shows  
 11:59:37AM 11 approximately 10 contacts between Mr. Haddow and  
 11:59:41AM 12 the state, eight of which are Mr. Haddow trying to  
 11:59:44AM 13 get information so that he can use it in his civil  
 11:59:48AM 14 litigation.

12:00:00PM 15 Your Honor, would you like me to keep  
 12:00:00PM 16 going this afternoon? How would you like me to  
 12:00:03PM 17 proceed?

12:00:03PM 18 THE COURT: Let's go ahead and break. Let's  
 12:00:04PM 19 resume at 1:15. We'll be in recess.

01:15:18PM 20 (Recess.)

01:15:18PM 21 THE COURT: The record will show the presence  
 01:15:18PM 22 of Mr. Ray and the attorneys.

01:15:20PM 23 Ms. Polk, you may continue.

01:15:25PM 24 MS. POLK: Thank you, Your Honor. Again, I do  
 01:15:47PM 25 appreciate the Court's patience with allowing the  
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01:15:49PM 1 state to make a full record on each of these  
 01:15:52PM 2 incidents that have been alleged by the defense as  
 01:15:55PM 3 prosecutorial misconduct.

01:15:57PM 4 When we broke before lunch, Your Honor,  
 01:15:58PM 5 we were talking about the issue of the late  
 01:16:01PM 6 disclosure by the state of the Haddow email. And,  
 01:16:06PM 7 again, that's an issue that the state never tried  
 01:16:10PM 8 to claim was anything other than an error. We  
 01:16:14PM 9 never made excuses for our oversight and not timely  
 01:16:17PM 10 disclosing the email.

01:16:19PM 11 Once we realized we had not disclosed it,  
 01:16:22PM 12 we disclosed it. As the Court knows, the state did  
 01:16:28PM 13 not hide it. We did not shred it. We did not  
 01:16:30PM 14 destroy it. We did not try to argue to this court  
 01:16:34PM 15 that we had no obligation to disclose it.

01:16:37PM 16 We did what a prosecutor must do, which  
 01:16:41PM 17 was we disclosed it and accepted the consequences  
 01:16:45PM 18 imposed by the Court. That late disclosure of the  
 01:16:48PM 19 Haddow email is an error that I am not proud of.  
 01:16:51PM 20 But I am proud, Your Honor, of the fact that the  
 01:16:54PM 21 state promptly disclosed it when we found it and  
 01:17:00PM 22 that we owned up to that error.

01:17:00PM 23 Again, the test under the Trani case and  
 01:17:04PM 24 the other cases that I've cited to the Court are  
 01:17:07PM 25 not met here in finding now at this juncture in the  
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01:17:12PM 1 case that the state's late disclosure of the email  
 01:17:16PM 2 gives rise to prosecutorial misconduct causing a  
 01:17:18PM 3 new trial.

01:17:20PM 4 The state's late disclosure was not  
 01:17:22PM 5 intentional. It was not conduct that we engaged in  
 01:17:25PM 6 knowing it to be improper and prejudicial. The  
 01:17:28PM 7 state did not possess or exhibit an indifference to  
 01:17:33PM 8 the danger of a mistrial. And there is no  
 01:17:38PM 9 reasonable likelihood that the late disclosure  
 01:17:38PM 10 affected the jury's verdict or denied the defendant  
 01:17:43PM 11 a fair trial.

01:17:45PM 12 Again, going back to the law, Your Honor,  
 01:17:47PM 13 to warrant a new trial the defendant must show that  
 01:17:50PM 14 the prosecutorial misconduct were not just errors.  
 01:17:53PM 15 And, again, the cases are clear that there is a  
 01:17:58PM 16 distinction between errors and prosecutorial  
 01:17:58PM 17 misconduct and that the two are not synonymous.

01:18:02PM 18 The Arizona Supreme Court has drawn that  
 01:18:05PM 19 important distinction in the State versus Minnitt  
 01:18:07PM 20 case, which I cited in our response, and which is  
 01:18:10PM 21 found at 203 Ariz. 431, wherein the Court stated  
 01:18:15PM 22 there is, quote, an important distinction between  
 01:18:18PM 23 simple prosecutorial error, such as an isolated  
 01:18:24PM 24 misstatement or loss of temper, and misconduct that  
 01:18:27PM 25 is so egregious that it raises concerns over the  
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01:18:31PM 1 integrity and the fundamental fairness of the trial  
 01:18:33PM 2 itself.

01:18:34PM 3 Prosecutorial misconduct is not merely  
 01:18:37PM 4 the result of legal error, negligence, mistake or  
 01:18:42PM 5 insignificant impropriety, but taken as a whole  
 01:18:48PM 6 must amount to intentional conduct, which the  
 01:18:48PM 7 prosecutor knows to be improper and prejudicial,  
 01:18:52PM 8 and which he or she pursues for an improper purpose  
 01:18:55PM 9 with indifference to a significant resulting danger  
 01:18:58PM 10 of mistrial. That test is simply not met here with  
 01:19:03PM 11 respect to the Haddow email or any of the issues  
 01:19:07PM 12 raised in the defense's motion.

01:19:08PM 13 Finally, I would point the Court to State  
 01:19:12PM 14 versus Aguilar, again cited in our response at 217  
 01:19:20PM 15 Ariz. 235 and the following issue that came in that  
 01:19:21PM 16 case. That case involved a trial in October 2005  
 01:19:30PM 17 where the prosecutor failed to disclose a  
 01:19:34PM 18 ballistics report. When the prosecutor was near  
 01:19:37PM 19 the end of his case, he realized he had not  
 01:19:40PM 20 disclosed the ballistics report, and he disclosed  
 01:19:44PM 21 it.

01:19:45PM 22 The Court on review looks at the test set  
 01:19:50PM 23 forth in Poole versus Superior Court, which is the  
 01:19:52PM 24 standard that I cited for the Court. And the Court  
 01:19:58PM 25 noted the following: That the report was disclosed  
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01 20 00PM 1 after the trial had commenced and close to the end  
 01 20 03PM 2 of the prosecutors case, that the prosecutor then  
 01 20 06PM 3 suggested a short continuance or mistrial to cure  
 01 20 09PM 4 the lack of disclosure. And the prosecutor argued  
 01 20 12PM 5 a legally incorrect argument with respect to the  
 01 20 15PM 6 report in several respects.

01 20 20PM 7 On review, the Court in Aguilar -- and  
 01 20 24PM 8 this was a court of appeals in Arizona -- at  
 01 20 27PM 9 page 239 stated the following: Although the  
 01 20 31PM 10 failure to timely discover and disclose the report  
 01 20 35PM 11 was entirely attributable to the state and the  
 01 20 38PM 12 prosecutor's argument was erroneous, the  
 01 20 43PM 13 prosecutor's actions do not amount to prosecutorial  
 01 20 46PM 14 misconduct.

01 20 48PM 15 State versus Trani, cited in our  
 01 20 51PM 16 response -- and the cite is 200 Ariz. 383 --  
 01 20 56PM 17 specifically provides that the Court shall look to  
 01 20 58PM 18 the objective factors in determining whether the  
 01 21 01PM 19 prosecutor acted intentionally, knowing his conduct  
 01 21 04PM 20 to be improper and in the pursuit of the improper  
 01 21 09PM 21 purpose without regard to the possibility of  
 01 21 12PM 22 mistrial.

01 21 13PM 23 And the Court in the Trani case lists the  
 01 21 15PM 24 following objective factors that the Court should  
 01 21 18PM 25 consider in determining whether prosecutorial  
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01 21 20PM 1 misconduct occurred. Those factors include the  
 01 21 23PM 2 situation in which the prosecutor found himself,  
 01 21 26PM 3 the evidence of actual knowledge and intent, and  
 01 21 30PM 4 any other factors which may give rise to an  
 01 21 33PM 5 appropriate inference or conclusion, and the  
 01 21 37PM 6 prosecutor's own explanation of his own knowledge  
 01 21 40PM 7 and intent.

01 21 43PM 8 Your Honor, clearly in this case there  
 01 21 45PM 9 has been no harm that has been shown or prejudice  
 01 21 50PM 10 as a result of the state's late disclosure of the  
 01 21 52PM 11 Haddow email. The Court at the time dealt with the  
 01 21 55PM 12 issue appropriately and in an immediate fashion.  
 01 21 58PM 13 The Court found that there was a Brady violation.  
 01 22 02PM 14 The Court suspended our trial for several days in  
 01 22 05PM 15 order to give the defense time to interview  
 01 22 08PM 16 Mr. Haddow and hire their own expert if they wanted  
 01 22 11PM 17 to.

01 22 12PM 18 And, in fact, the defense interviewed  
 01 22 17PM 19 Mr. Haddow on April 15th of 2011. In that  
 01 22 20PM 20 interview they confirmed with Mr. Haddow directly  
 01 22 24PM 21 that he had not ever been hired by the state, that  
 01 22 31PM 22 the state had not paid him any money. He confirmed  
 01 22 36PM 23 that Mr. Haddow had contacted the state initially  
 01 22 38PM 24 and not the other way around. And he confirmed to  
 01 22 39PM 25 the defense that the state told him directly that

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01 22 41PM 1 we had concerns with his qualifications.

01 22 44PM 2 At that time the defense exercised the  
 01 22 47PM 3 various remedies offered by the Court, chose not to  
 01 22 51PM 4 call Mr. Haddow as a witnesses at trial or call  
 01 22 53PM 5 other experts specifically on that topic.

01 22 55PM 6 What they did do instead was  
 01 22 58PM 7 cross-examine witnesses as the Court permitted on  
 01 23 02PM 8 the issue of the Haddow email. Specifically, they  
 01 23 05PM 9 made mention of Mr. Haddow's report in their  
 01 23 08PM 10 cross-examination of Debra Mercer and Michael  
 01 23 14PM 11 Hamilton. They questioned Detective Diskin  
 01 23 16PM 12 regarding the late disclosure of the report and the  
 01 23 19PM 13 Court's finding of a Brady violation and sanctions.

01 23 21PM 14 In the state's opinion, they used the  
 01 23 25PM 15 issue to suggest the state was hiding information  
 01 23 27PM 16 from the jury. And the Court will recall that I  
 01 23 32PM 17 objected, and there was lengthy oral argument on  
 01 23 34PM 18 that issue.

01 23 38PM 19 And in response the state questioned  
 01 23 37PM 20 Detective Diskin regarding what he had told the  
 01 23 42PM 21 defense attorneys about carbon dioxide during his  
 01 23 46PM 22 interview and what he learned from the Haddow email  
 01 23 50PM 23 regarding carbon dioxide.

01 23 51PM 24 Your Honor, at the time, in light of what  
 01 23 53PM 25 we believe to be the continued misrepresentation of  
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01 23 56PM 1 the contents of the Haddow report in front of jury,  
 01 24 01PM 2 you will recall that we filed a motion requesting  
 01 24 03PM 3 to call Mr. Haddow as a witness and that the Court  
 01 24 06PM 4 denied that motion and precluded us from calling  
 01 24 09PM 5 Mr. Haddow.

01 24 10PM 6 In fact, on April 25 of 2011, the defense  
 01 24 14PM 7 filed a motion to exclude the testimony of Rick  
 01 24 17PM 8 Haddow. And in that motion the Court will recall  
 01 24 21PM 9 that the defense conceded that Mr. Haddow was not  
 01 24 24PM 10 qualified as an expert, which was the very reason  
 01 24 27PM 11 why the state had withdrawn him as a witness.

01 24 31PM 12 I'll quote from that motion where they  
 01 24 32PM 13 stated that, quote, serious questions exist as to  
 01 24 36PM 14 Mr. Haddow's qualifications. And, quote  
 01 24 42PM 15 Mr. Haddow's opinions include matters for which he  
 01 24 45PM 16 has no qualifications at all, such as the medical  
 01 24 48PM 17 condition of participants and the cause of death.  
 01 24 51PM 18 And that comes from page 7, lines 8 to 9, of the  
 01 24 55PM 19 defendant's motion to exclude the testimony of Rick  
 01 24 58PM 20 Haddow.

01 25 00PM 21 In fact, later at trial when the defense  
 01 25 03PM 22 questioned their own expert, Dr. Paul, asked him to  
 01 25 06PM 23 testify, answer the question as to whether carbon  
 01 25 10PM 24 dioxide would pool in a particular area in the  
 01 25 13PM 25 sweat lodge, they elicited testimony indicating

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01:25:16PM 1 additional information, I believe, that this court  
01:25:18PM 2 can consider now in finding that the late  
01:25:21PM 3 disclosure was harmless error and did not prejudice  
01:25:24PM 4 the defendant.

01:25:27PM 5 And I'm referring to the transcript now  
01:25:30PM 6 from the testimony of Dr. Paul. And this is from  
01:25:47PM 7 June 9 of 2011. And this is the redirect  
01:25:50PM 8 examination of Dr. Paul, who was the defense's  
01:26:00PM 9 medical expert witness.

01:26:01PM 10 And I'm referring to page 127 on that  
01:26:03PM 11 testimony on that day. And the question from  
01:26:10PM 12 Ms. Do was, so if people are breathing in a closed  
01:26:16PM 13 container and oxygen is being reduced and carbon  
01:26:20PM 14 dioxide is increased, what would you expect the  
01:26:22PM 15 carbon dioxide to do in terms of how it would  
01:26:25PM 16 spread out, for example, in a sweat lodge structure  
01:26:28PM 17 assuming it's a closed container?

01:26:31PM 18 And the answer from Dr. Paul was, it  
01:26:33PM 19 should be equally distributed.

01:26:35PM 20 I bring that testimony to the Court's  
01:26:37PM 21 attention because I believe the Court should  
01:26:39PM 22 consider that additional information that was  
01:26:42PM 23 learned at trial from the defense's own expert.  
01:26:45PM 24 His opinion was that carbon dioxide -- apparently  
01:26:48PM 25 his opinion was that carbon dioxide would not pool,

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01:26:51PM 1 that it would be equally distributed throughout the  
01:26:55PM 2 sweat lodge, which would contradict the information  
01:26:57PM 3 set forth in Mr. Haddow's email.

01:27:01PM 4 But I bring that to the Court's attention  
01:27:02PM 5 because I believe, in the Court's determination,  
01:27:04PM 6 that the late disclosure of the email was harmless  
01:27:07PM 7 and did not prejudice the defendant. I believe the  
01:27:10PM 8 Court should consider the opinion of the defense's  
01:27:14PM 9 own expert, who contradicts the opinion that was  
01:27:19PM 10 set forth in the Rick Haddow email.

01:27:28PM 11 This court appropriately addressed the  
01:27:31PM 12 issue of the late disclosure of the Haddow email at  
01:27:34PM 13 the time of the disclosure. This court applied  
01:27:38PM 14 appropriate sanction and a remedy. And there is no  
01:27:38PM 15 evidence that the late disclosure affected the  
01:27:42PM 16 jury's verdict or denied the defendant a fair  
01:27:44PM 17 trial, which is the testifying prosecutorial  
01:27:47PM 18 misconduct or cumulative effect therefrom.

01:27:50PM 19 In fact, in its minute entry dated May 9  
01:27:53PM 20 of 2011, wherein this court denied the defense's  
01:27:57PM 21 request for further sanctions against the state,  
01:28:04PM 22 this court correctly noted that the defendant chose  
01:28:04PM 23 not to call Haddow as its own witness for purposes  
01:28:07PM 24 of presenting any exculpatory information contained  
01:28:11PM 25 in the report, that the defense does not wish to

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01:28:14PM 1 obtain another expert witness to address any issue  
01:28:17PM 2 involving sweat lodge construction. And issues  
01:28:20PM 3 concerning the potential significance of carbon  
01:28:23PM 4 dioxide and the location of participants in the  
01:28:26PM 5 sweat lodge have been known to the parties for  
01:28:28PM 6 months prior to the commencement of the trial.  
01:28:31PM 7 That's from the Court's minute entry dated May 9  
01:28:35PM 8 of 2011.

01:28:38PM 9 Again, I bring that to the Court's  
01:28:38PM 10 attention to consider the issue of whether  
01:28:41PM 11 prejudice resulted or whether, in fact, this was  
01:28:44PM 12 harmless error by the state, which I believe that  
01:28:47PM 13 it was.

01:28:48PM 14 The Court having granted a continuance to  
01:28:50PM 15 allow the defense attorneys to interview Mr. Haddow  
01:28:54PM 16 and call their own expert on the issue if they so  
01:28:58PM 17 chose; the defendant having argued and conceded the  
01:29:01PM 18 lack of qualifications of Mr. Haddow to render the  
01:29:07PM 19 opinions; the defense having questioned trial  
01:29:10PM 20 witnesses about the email suggesting that the state  
01:29:12PM 21 was withholding information from the jury; the  
01:29:14PM 22 defense having told the jury about the late  
01:29:17PM 23 disclosure and about sanctions, having used the  
01:29:20PM 24 word "Brady" without permission of the Court and  
01:29:23PM 25 having presented trial testimony through their own

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01:29:25PM 1 expert, Dr. Paul, that they would not expect carbon  
01:29:30PM 2 dioxide to Poole inside the sweat lodge all point  
01:29:33PM 3 to the fact that the defendant cannot now argue  
01:29:35PM 4 that he was harmed by the late disclosure of the  
01:29:40PM 5 Haddow email.

01:29:40PM 6 I cited the Court already to State versus  
01:29:43PM 7 Roque, which, I believe, provides an excellent  
01:29:46PM 8 framework for the Court to consider and analyze all  
01:29:49PM 9 the alleged incidents within which the State versus  
01:29:55PM 10 Roque case -- it's from 2006. I know the Court is  
01:29:57PM 11 familiar with it from the issues in the case.

01:30:01PM 12 But in that case the Arizona Supreme  
01:30:02PM 13 Court found the state's failure to disclose the  
01:30:04PM 14 extent of the state's expert testimony on the  
01:30:07PM 15 central issue in a capital murder case was they  
01:30:12PM 16 found that that was error.

01:30:14PM 17 But during trial the trial court had  
01:30:17PM 18 found the failure to disclose the testimony was not  
01:30:20PM 19 a disclosure violation but nonetheless proposed a  
01:30:23PM 20 recess to allow the defense to interview the  
01:30:27PM 21 expert, which is what happened here. In the Roque  
01:30:28PM 22 case the defense declined to do so.

01:30:32PM 23 But on review, the Arizona Supreme Court  
01:30:33PM 24 found that the state had engaged in inappropriate  
01:30:38PM 25 contact in not disclosing the extent of the expert

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01 30 40PM 1 witness's proposed trial testimony but found that  
 01 30 44PM 2 the trial court had imposed appropriate sanctions  
 01 30 47PM 3 and noted that the defense had refused to accept  
 01 30 50PM 4 those sanctions.

01 30 53PM 5 And so in the Roque case the supreme  
 01 30 55PM 6 court found that there was no reason to grant a new  
 01 30 58PM 7 trial, denied it, as I suggest the Court should do  
 01 31 03PM 8 in this case as well.

01 31 08PM 9 The third error that the state made and  
 01 31 11PM 10 that we have readily conceded, Your Honor, occurred  
 01 31 15PM 11 during my closing arguments during the guilt phase.  
 01 31 19PM 12 And that's when I had played for the jury  
 01 31 23PM 13 Exhibit 743, which is the audio clip containing the  
 01 31 27PM 14 words of Kirby Brown. That audio clip had been  
 01 31 31PM 15 admitted by the Court during our guilt phase. It  
 01 31 35PM 16 had been played for the jury, but it had been  
 01 31 38PM 17 admitted for a limited purpose.

01 31 42PM 18 When I played it in my closing, I  
 01 31 45PM 19 erroneously argued to the jury that they could  
 01 31 47PM 20 consider that audio clip for what it told them  
 01 31 50PM 21 about Kirby's frame of mind as she entered the  
 01 31 54PM 22 sweat lodge. That went beyond what the Court had  
 01 31 57PM 23 admitted that audio clip for.

01 32 01PM 24 That was objected to at the time by the  
 01 32 04PM 25 defense. We immediately admitted our error,  
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01 32 10PM 1 Your Honor. We pulled out the jury instruction  
 01 32 14PM 2 that the Court had read for the jury at the time it  
 01 32 18PM 3 was first played for them. And it was clear that  
 01 32 21PM 4 it had been admitted for the limited purpose  
 01 32 23PM 5 pertaining, as I recall, the -- pertaining to the  
 01 32 33PM 6 defendant.

01 32 35PM 7 At that time, then, the state admitted  
 01 32 38PM 8 the error. The Court upon defendant's request  
 01 32 43PM 9 again read to the jury the limiting instruction  
 01 32 45PM 10 that was read when they first heard that audio  
 01 32 47PM 11 clip. So any error was immediately cured by this  
 01 32 50PM 12 court's action. And the Court reminded the jury,  
 01 32 52PM 13 as you did many times throughout the trial, that  
 01 32 55PM 14 the lawyers' comments are not evidence.

01 32 58PM 15 The State versus Scott case, which we  
 01 33 01PM 16 cited in the brief, which is an appellate decision  
 01 33 04PM 17 in Arizona from 1975, specifically holds that the  
 01 33 08PM 18 Court's instruction to the jury can cure an error.  
 01 33 12PM 19 And I quote, the trial court's timely corrective  
 01 33 16PM 20 measures were sufficient to prevent the  
 01 33 18PM 21 prosecutor's remarks from influencing the jury.

01 33 26PM 22 And I would submit, Your Honor, that that  
 01 33 30PM 23 error at the time it was made was appropriately and  
 01 33 32PM 24 speedily, in fact, immediately addressed by the  
 01 33 32PM 25 Court. And it was corrected by reading to the jury

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01 33 38PM 1 the limiting instruction and reminding the jury  
 01 33 38PM 2 that the attorneys' comments are not evidence.  
 01 33 40PM 3 Those are the three errors that the state  
 01 33 45PM 4 has made in this trial. We have conceded and  
 01 33 48PM 5 admitted all three errors and never tried to argue  
 01 33 52PM 6 otherwise. All three errors were appropriately  
 01 33 55PM 7 dealt with at the time. And under the tests set  
 01 33 58PM 8 forth in Trani and Hughes and Roque and the other  
 01 34 01PM 9 cases I cited to the Court, none of those three  
 01 34 04PM 10 errors rise to the level of prosecutorial  
 01 34 07PM 11 misconduct. None of them were engaged in  
 01 34 09PM 12 intentionally for an improper purpose, and none of  
 01 34 12PM 13 them resulted in denying the defendant a fair  
 01 34 15PM 14 trial.

01 34 17PM 15 There are still 28 other incidents that  
 01 34 18PM 16 the defense has alleged constitute prosecutorial  
 01 34 24PM 17 misconduct. And, again, I appreciate the  
 01 34 30PM 18 opportunity to make a full record of each of those  
 01 34 34PM 19 incidents.

01 34 38PM 20 The first one of those incidents which  
 01 34 41PM 21 the state submits is not error of any kind is set  
 01 34 45PM 22 forth on page 4 to 5 of the defendant's motion for  
 01 34 48PM 23 new trial. And it's captioned "The December 14  
 01 34 55PM 24 meeting." Or perhaps I've captioned that.

01 34 58PM 25 But I'll quote from page 4 of the  
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01 34 58PM 1 defendant's motion, line 7 to 11, where the -- it  
 01 35 03PM 2 is written in the defense's motion, quote, that the  
 01 35 06PM 3 state, quote, insisted frivolously that this  
 01 35 10PM 4 meeting, referring to the December meeting between  
 01 35 15PM 5 the prosecutors, the medical examiners and the  
 01 35 19PM 6 investigators -- the state insisted frivolously  
 01 35 22PM 7 that this meeting, including the fact of this  
 01 35 24PM 8 occurrence, the names of those who attended and the  
 01 35 26PM 9 information provided to the state's testifying  
 01 35 29PM 10 expert medical witnesses was somehow protected by  
 01 35 33PM 11 work-product privilege, close quote.

01 35 35PM 12 The state takes issue with that  
 01 35 37PM 13 statements, Your Honor. That's not a correct  
 01 35 39PM 14 statement of the issue. And I would like to  
 01 35 42PM 15 explain. First of all, there is absolutely no  
 01 35 48PM 16 misconduct by the state with regard to that  
 01 35 50PM 17 meeting. And this court has never made such a  
 01 35 52PM 18 finding.

01 35 53PM 19 There was a good-faith argument that the  
 01 35 58PM 20 state had that our notes and our PowerPoint from  
 01 36 00PM 21 that meeting were work-product protected. We  
 01 36 03PM 22 brought the issue or we responded to the issue when  
 01 36 06PM 23 the defense filed a motion. We litigated the issue  
 01 36 08PM 24 in good faith. And doing so does not -- because  
 01 36 12PM 25 the Court ruled against us does not somehow convert

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01:36:15PM 1 a good-faith legal position that the state had into  
01:36:18PM 2 prosecutorial misconduct.

01:36:21PM 3 The sentence that I just read to you from  
01:36:24PM 4 page 4 of the defendant's motion contains a number  
01:36:27PM 5 of misstatements. First of all, it is absolutely  
01:36:30PM 6 false that the state ever withheld the fact of the  
01:36:33PM 7 existence of the meeting, as is written. It's  
01:36:36PM 8 false that we ever withheld the names of who was  
01:36:39PM 9 there. And it's false that we withheld information  
01:36:42PM 10 provided to the medical examiners.

01:36:45PM 11 In the pretrial interviews of Dr. Mosley  
01:36:48PM 12 and Detective Diskin, the defense attorneys were  
01:36:51PM 13 told who was at the meeting, where it was held,  
01:36:54PM 14 what was discussed, that there was a discussion  
01:36:57PM 15 among the medical examiners about whether to call  
01:37:00PM 16 the deaths heat stroke or hyperthermia and that the  
01:37:03PM 17 cause of death was discussed. That was all  
01:37:06PM 18 provided to the defense attorneys through those  
01:37:09PM 19 interviews of Dr. Mosley and Detective Diskin  
01:37:12PM 20 before the issue came to the Court for decision  
01:37:15PM 21 about what the state had to further disclose.

01:37:18PM 22 But it's absolutely false to say that the  
01:37:21PM 23 state withheld that information when a review of  
01:37:24PM 24 the transcript of the interviews of Dr. Mosley and  
01:37:27PM 25 Dr. Dickson clearly shows that we did not withhold

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01:37:33PM 1 that information.

01:37:36PM 2 What the state objected to was the  
01:37:39PM 3 production of the PowerPoint that was played at the  
01:37:42PM 4 meeting. And we objected to the production of our  
01:37:45PM 5 prosecutor's notes as well as questions about  
01:37:48PM 6 theories and conclusions of prosecutors that we  
01:37:51PM 7 believed was our work production.

01:37:54PM 8 Legal dispute for this court was whether  
01:37:57PM 9 the defense attorneys were entitled to the  
01:38:00PM 10 prosecutor's notes from the meeting and whether  
01:38:03PM 11 they were entitled to a copy of that PowerPoint  
01:38:06PM 12 presentation that was prepared to facilitate the  
01:38:09PM 13 sheriff's office presentation of the case to those  
01:38:12PM 14 present at the meeting.

01:38:15PM 15 As I've just said, the state had a  
01:38:18PM 16 good-faith basis for our belief that the material  
01:38:21PM 17 was work product. The issue came to the Court, and  
01:38:24PM 18 the Court issued a minute entry on September 20,  
01:38:27PM 19 2010. And, in fact, in the Court's minute entry,  
01:38:30PM 20 the Court did not address the state's position that  
01:38:33PM 21 it was work production at all because the Court  
01:38:36PM 22 found, pursuant to the State versus Roque case,  
01:38:39PM 23 that there were other reasons requiring the state  
01:38:42PM 24 to turn over the PowerPoint as well as the  
01:38:45PM 25 prosecutor's notes.

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01:38:48PM 1 Specifically, the Court found that the  
01:38:51PM 2 medical examiners at the meeting considered the  
01:38:54PM 3 information presented at the meeting, that the  
01:38:57PM 4 meeting was not recorded and that the state  
01:39:00PM 5 therefore had to disclose any notes we had  
01:39:03PM 6 summarizing oral communications by the medical  
01:39:06PM 7 examiners.

01:39:09PM 8 And then the Court ordered that we comply  
01:39:12PM 9 with all the requests that the defense attorneys  
01:39:15PM 10 had made of us in a letter dated May 24, 2010. The  
01:39:18PM 11 state then fully complied with the Court's order.

01:39:21PM 12 The defense attorneys received the  
01:39:24PM 13 PowerPoint. They received any prosecutor and staff  
01:39:27PM 14 notes. And they proceeded to interview anyone who  
01:39:30PM 15 was at the meeting that they chose to interview.  
01:39:33PM 16 They received full disclosure of everything that  
01:39:36PM 17 the Court ordered and full access to asking  
01:39:39PM 18 subsequent witnesses about the meeting.

01:39:42PM 19 Again, the state had a good-faith legal  
01:39:45PM 20 basis for our legal argument that our notes and  
01:39:48PM 21 PowerPoint were work protected. And that's what  
01:39:51PM 22 the rules of procedure are about, the rule that  
01:39:54PM 23 allows a party to bring an issue to the Court's  
01:39:57PM 24 attention and for the Court to rule.

01:39:59PM 25 But to argue somehow now that our  
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01:40:02PM 1 good-faith basis and the fact that it came to the  
01:40:05PM 2 Court for a decision when that's what the rules  
01:40:08PM 3 contemplate, that somehow that's error, let alone  
01:40:11PM 4 prosecutorial misconduct, is simply not supported  
01:40:14PM 5 by the law or the facts.

01:40:17PM 6 And then, finally, the defendant has  
01:40:20PM 7 never shown any harm nor can any harm be shown by  
01:40:23PM 8 this legal dispute. The legal dispute was resolved  
01:40:26PM 9 well before trial. Full disclosure of the  
01:40:29PM 10 contested items were made and full access to the  
01:40:32PM 11 witnesses were made.

01:40:35PM 12 There can be no argument whatsoever that  
01:40:38PM 13 somehow that legal dispute between the parties  
01:40:41PM 14 denied the defendant a fair trial or otherwise  
01:40:44PM 15 permeated the atmosphere of the trial.

01:40:47PM 16 This is an issue, Your Honor, that the  
01:40:50PM 17 defense has alleged constitutes prosecutorial  
01:40:53PM 18 misconduct. But in the argument set forth in their  
01:40:56PM 19 motion, they cite no legal support whatsoever that  
01:40:59PM 20 that good-faith dispute somehow becomes error or  
01:41:02PM 21 prosecutorial misconduct.

01:41:05PM 22 I would just like to make a record,  
01:41:08PM 23 Your Honor. I won't go into details. But Trial  
01:41:11PM 24 Exhibit 683, which is the May 21, 2010, interview  
01:41:14PM 25 of Dr. Mosley, has Dr. Mosley answering all of the

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01:41:22PM 1 questions that were asked at that time about who  
 01:41:27PM 2 was present at the meeting, what was discussed,  
 01:41:30PM 3 what was in the PowerPoint, that the medical  
 01:41:35PM 4 examiners discussed cause of and manner of death,  
 01:41:41PM 5 heat stroke versus hyperthermia, and Dr. Mosley's  
 01:41:41PM 6 opinion that it was the same thing.

01:41:42PM 7 Likewise, in Detective Diskin's interview  
 01:41:45PM 8 of June 16, 2010 -- and that's Exhibit 25 --  
 01:41:49PM 9 Detective Diskin also answered questions as to the  
 01:41:51PM 10 date, location, identity of the participants, what  
 01:41:56PM 11 was discussed and whether participants took notes.  
 01:41:58PM 12 I just wanted to make a record that all that  
 01:42:01PM 13 information had been given to the defense in those  
 01:42:04PM 14 two interviews.

01:42:06PM 15 Exhibit 625, which is Detective Diskin's  
 01:42:13PM 16 interview by the defense, contained his explanation  
 01:42:18PM 17 to defense attorneys during his interview about the  
 01:42:20PM 18 purpose of the meeting, that he presented the  
 01:42:22PM 19 PowerPoint to the participants offering what the  
 01:42:25PM 20 investigation had uncovered. He explained that the  
 01:42:28PM 21 medical examiners had engaged in conversation among  
 01:42:34PM 22 themselves and that there was a debate among the  
 01:42:35PM 23 medical examiners about whether to call it heat  
 01:42:37PM 24 stroke or hyperthermia but that they had different  
 01:42:41PM 25 reasons for using different terminology but it

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01:42:44PM 1 appeared to be the same thing.

01:43:00PM 2 Under that same caption in the  
 01:43:02PM 3 defendant's pleadings, again referring to the  
 01:43:04PM 4 December 14 meeting, on page 4 of defendant's  
 01:43:11PM 5 motion for new trial, lines 23 through 25, it's  
 01:43:14PM 6 written in their motion, quote, the evidence is  
 01:43:17PM 7 that the medical examiners did disagree with each  
 01:43:22PM 8 other regarding the cause of death and that part of  
 01:43:23PM 9 the meeting's purpose was to resolve that  
 01:43:25PM 10 controversy.

01:43:26PM 11 This is an issue that I know the Court is  
 01:43:29PM 12 familiar with, as the medical examiner witnesses  
 01:43:32PM 13 were cross-examined at trial about heat stroke  
 01:43:35PM 14 versus hyperthermia. I just want to make a record  
 01:43:38PM 15 that in Dr. Mosley's defense interview -- and  
 01:43:43PM 16 that's trial Exhibit 683. The interview was on  
 01:43:48PM 17 May 21, 2010 -- lines 21 -- or page 21, lines 2 to  
 01:43:54PM 18 6, that Ms. Do questioned Dr. Mosley.

01:44:00PM 19 Quote, okay. So then if you can explain  
 01:44:02PM 20 to me what is the disagreement with the phrase  
 01:44:05PM 21 "heat stroke" as compared to "hyperthermia."

01:44:10PM 22 Dr. Mosley: It's wording.

01:44:11PM 23 Ms. Do: Just wording?

01:44:14PM 24 Dr. Mosley: Yeah.

01:44:14PM 25 I understand, Your Honor, that the

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01:44:17PM 1 defense argued at trial and presented testimony in  
 01:44:21PM 2 support of their position that there is a  
 01:44:24PM 3 difference. But my point is to make a record that  
 01:44:26PM 4 the information that was being given to the state  
 01:44:28PM 5 at the time was the doctor's opinion that heat  
 01:44:33PM 6 stroke versus hyperthermia, that there was no  
 01:44:34PM 7 difference and that it was just a difference in  
 01:44:37PM 8 wording.

01:44:37PM 9 And that is, in fact, what  
 01:44:38PM 10 Detective Diskin, then, when he was interviewed --  
 01:44:43PM 11 and that's set forth in Exhibit 625 at page 35  
 01:44:48PM 12 where he responded -- when he was asked about the  
 01:44:52PM 13 meeting and this issue, he responded, there was a  
 01:44:55PM 14 debate on whether or not to call it "heat stroke"  
 01:44:58PM 15 or "hyperthermia," which appeared to be the same  
 01:45:02PM 16 thing but they had different reasons for using  
 01:45:05PM 17 different terminology.

01:45:08PM 18 The third statement I'd like to address  
 01:45:08PM 19 that is in the defendant's motion for new trial is  
 01:45:10PM 20 still under that same caption, the December 14  
 01:45:14PM 21 meeting. And it's on page 4, lines 20 -- line 26.  
 01:45:21PM 22 And it goes on to page 5, line 1. And this is a  
 01:45:23PM 23 quote. It says, quote, worse. The fact is the  
 01:45:27PM 24 state was withholding information relied upon by  
 01:45:30PM 25 the medical examiners in reaching their conclusion,

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01:45:33PM 1 and the state knew it.

01:45:37PM 2 Again, Your Honor, I appreciate the  
 01:45:38PM 3 opportunity to make a record to clear up what I  
 01:45:40PM 4 believe to be misstatements set forth in the  
 01:45:43PM 5 motion. I don't believe there is any basis in fact  
 01:45:45PM 6 for that statement, as the state never withheld any  
 01:45:48PM 7 information.

01:45:51PM 8 The Court knows that the PowerPoint,  
 01:45:54PM 9 according to Detective Diskin was a summary of the  
 01:45:58PM 10 investigation, and the Court knows that all of the  
 01:46:00PM 11 police reports that the detective had summarized in  
 01:46:04PM 12 that PowerPoint as well as medical records were  
 01:46:08PM 13 made available to the defense attorneys.

01:46:15PM 14 And then the fourth statement still made  
 01:46:17PM 15 under that same caption is on page 4 of defendant's  
 01:46:22PM 16 motion. And this is lines 1 to 4. It says, quote,  
 01:46:26PM 17 worse still, that information, a slanted PowerPoint  
 01:46:30PM 18 presentation compiled by Detective Diskin,  
 01:46:33PM 19 contained material inaccuracies including the false  
 01:46:37PM 20 assertion that a prior sweat lodge participant,  
 01:46:42PM 21 Daniel P., had been diagnosed with heat stroke.  
 01:46:47PM 22 And then the reference is to generally the trial  
 01:46:48PM 23 transcript of 3/31/11 at page 207.

01:46:53PM 24 Your Honor, the state takes issue with  
 01:46:58PM 25 that statement. I don't want to belabor this

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01:47:00PM 1 point. But, again, I appreciate the opportunity to  
 01:47:02PM 2 make a full record. And I feel it's necessary to  
 01:47:05PM 3 address that statement in particular because I  
 01:47:08PM 4 don't think it's fair to the reputation of  
 01:47:11PM 5 Detective Diskin to leave that statement as it's  
 01:47:14PM 6 written uncontested.

01:47:18PM 7 I don't believe there is any basis for  
 01:47:20PM 8 the statement that the PowerPoint was slanted.  
 01:47:22PM 9 And, in fact, in the defendant's motion they offer  
 01:47:24PM 10 no evidence to support that statement. In fact, it  
 01:47:28PM 11 was a well-balanced presentation.

01:47:35PM 12 I want to make a record of the fact that  
 01:47:37PM 13 Detective Diskin had been told by Daniel Pfankuch  
 01:47:40PM 14 that he had been diagnosed with heat stroke. And  
 01:47:43PM 15 that has been disclosed to the defense. That was  
 01:47:47PM 16 disclosed as Bates 0286. We disclosed the Yavapai  
 01:47:50PM 17 County Sheriff's Office supplemental report,  
 01:47:53PM 18 No. 65. And that was disclosed actually at EDC,  
 01:48:04PM 19 Your Honor, so very early on in this case.

01:48:08PM 20 And that Bates stamp 0286 revealed -- and  
 01:48:10PM 21 this was provided to the defense early on -- that's  
 01:48:13PM 22 the summary of the interview of Daniel Pfankuch by  
 01:48:16PM 23 Detective Diskin. And that interview occurred on  
 01:48:20PM 24 October 31st of 2009.

01:48:23PM 25 And in that summary, which the defense  
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01:48:26PM 1 had at the time going back to EDC, quote -- that  
 01:48:32PM 2 report says, I asked Daniel what the hospital told  
 01:48:35PM 3 him was wrong with him. Daniel said, heat stroke  
 01:48:38PM 4 and severe dehydration. And so it's based on that,  
 01:48:41PM 5 then, that the detective put that in the  
 01:48:44PM 6 PowerPoint.

01:48:48PM 7 The defense interviewed Detective Diskin.  
 01:48:49PM 8 Again, I've already talked about the interview that  
 01:48:53PM 9 occurred on June 16, 2010. And that was marked as  
 01:48:58PM 10 Trial Exhibit 625. And on page 51, lines 8 through  
 01:49:03PM 11 22, the defense asked Detective Diskin what he  
 01:49:08PM 12 understood Daniel Pfankuch had been diagnosed with.

01:49:12PM 13 And in that interview as well, that's  
 01:49:15PM 14 exactly what Detective Diskin told the defense.  
 01:49:17PM 15 Quote, that it was some type of heat-related  
 01:49:21PM 16 illness, but I don't know -- I remember  
 01:49:23PM 17 Mr. Pfankuch told me that he was diagnosed with  
 01:49:26PM 18 heat stroke. And I don't remember if that's what  
 01:49:29PM 19 the medical records said or not.

01:49:32PM 20 Also part of the record in this case is  
 01:49:38PM 21 Trial Exhibit 257, which is the paramedic report  
 01:49:41PM 22 dated October 15 of 2005 pertaining to the 9-1-1  
 01:49:47PM 23 call to attend to Daniel Pfankuch. And that was  
 01:49:51PM 24 provided to the defense at Bates 2214.

01:50:01PM 25 This is Trial Exhibit 257. And that  
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01:50:08PM 1 paramedic report reveals -- this is the paramedic  
 01:50:10PM 2 who responded in October of 2005 to the Daniel  
 01:50:14PM 3 Pfankuch incident. And I'll just read a couple  
 01:50:18PM 4 lines. It says -- this is an interview with Daniel  
 01:50:21PM 5 Pfankuch's wife. She stated that when he came out,  
 01:50:25PM 6 the patient was acting aggressive and strange for  
 01:50:29PM 7 him. She stated that he was trying to --

01:50:32PM 8 MR. KELLY: Your Honor, excuse me. Judge,  
 01:50:34PM 9 this is way beyond the scope of the record in this  
 01:50:37PM 10 trial, and it is not part of the record. Ms. Polk  
 01:50:41PM 11 is not making a record. In order for there to be a  
 01:50:44PM 12 record, there would need to be an evidentiary  
 01:50:47PM 13 hearing.

01:50:48PM 14 So we're making reference to hearsay  
 01:50:50PM 15 statements relating to documents which are not part  
 01:50:55PM 16 of this record.

01:50:56PM 17 And I know she said three hours, but if  
 01:51:02PM 18 she's going to address 31 concerns, we're only at  
 01:51:05PM 19 No. 4. And we've been in this for a couple hours.

01:51:08PM 20 THE COURT: Ms. Polk, you may continue.

01:51:10PM 21 MS. POLK: Thank you, Your Honor. And I'll  
 01:51:11PM 22 just make a note that this is part of the record.  
 01:51:13PM 23 It was admitted. It's Trial Exhibit 257.

01:51:20PM 24 And as I was reading, she stated he was  
 01:51:22PM 25 trying to do handstands and wanted to fight with  
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01:51:26PM 1 everyone. He then passed out and could not be  
 01:51:28PM 2 aroused. A bystander stated that she checked his  
 01:51:32PM 3 pulse, which was racing, so she decided to call  
 01:51:35PM 4 9-1-1.

01:51:36PM 5 The patient was in the middle of a crowd  
 01:51:38PM 6 of people being held up by him. His eyes were  
 01:51:41PM 7 rolled back in his head, and he was unresponsive.  
 01:51:43PM 8 And then the paramedic's own observations are that  
 01:51:46PM 9 the eyes were rolled back in the head, not  
 01:51:48PM 10 responsive and that he -- the patient was moved to  
 01:51:52PM 11 a gurney, then to ambulance for assessment and that  
 01:51:55PM 12 they were unable to arouse the patient for a few  
 01:51:57PM 13 minutes.

01:51:58PM 14 Your Honor -- and I'm not trying to  
 01:51:59PM 15 quibble with any of the Court's rulings at trial.  
 01:52:05PM 16 I do want to make a record, though, responding  
 01:52:08PM 17 directly to statements that are made in the  
 01:52:12PM 18 defendant's motion. And I quoted for the Court the  
 01:52:15PM 19 page and quoted the exact line in the defendant's  
 01:52:19PM 20 motion where they suggested that the PowerPoint  
 01:52:22PM 21 compiled by Detective Diskin included the false  
 01:52:25PM 22 assertion that a prior sweat lodge participant,  
 01:52:32PM 23 Daniel P., had been diagnosed with heat stroke.

01:52:35PM 24 MR. KELLY: Judge, I apologize for  
 01:52:38PM 25 interrupting. The argument, Exhibit 257, is not  
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01:52:43PM 1 admitted in this trial.

01:52:46PM 2 MS. POLK: Your Honor, I agree. And I  
01:52:48PM 3 apologize. It was admitted at the 404(b) hearing.  
01:52:50PM 4 I'll have to get the Court's -- I believe it was  
01:52:52PM 5 admitted at the 404(b) hearing. If it wasn't, I'll  
01:52:54PM 6 stand corrected.

01:53:00PM 7 Your Honor, on this issue I'm just trying  
01:53:02PM 8 to make a record that when Detective Diskin  
01:53:04PM 9 compiled that PowerPoint presentation, he was  
01:53:07PM 10 relying on information that Daniel Pfankuch  
01:53:10PM 11 directly told him. And then there is that  
01:53:13PM 12 paramedic report that seems to substantiate the  
01:53:16PM 13 same thing.

01:53:18PM 14 I'm not trying to ask the Court to  
01:53:19PM 15 revisit any issues. I'm just trying to make a  
01:53:22PM 16 record of what I believe the facts in the case  
01:53:24PM 17 support and address statements made directly in the  
01:53:28PM 18 defendant's motion.

01:53:31PM 19 The bottom line, Your Honor, as regards  
01:53:36PM 20 to that statement is that the Court knows that no  
01:53:38PM 21 testimony about what happened in 2005 ever came to  
01:53:43PM 22 the jury. So the defendant can show no harm in any  
01:53:46PM 23 way from the inclusion of that statement in the  
01:53:50PM 24 PowerPoint presentation back at the December  
01:53:52PM 25 meeting.

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01:53:53PM 1 And that seems to be the argument that's  
01:53:56PM 2 being made here is that somehow because that  
01:53:58PM 3 statement was in the PowerPoint, that would be  
01:54:00PM 4 grounds for a new trial based on prosecutorial  
01:54:04PM 5 misconduct.

01:54:05PM 6 On the final analysis whether or not  
01:54:10PM 7 there was any harm resulting from that good-faith  
01:54:13PM 8 legal dispute over the defendant's right to the  
01:54:18PM 9 prosecutor's notes and the PowerPoint presentation  
01:54:21PM 10 from the December meeting, I would submit to the  
01:54:25PM 11 Court that there is no harm. First of all, no  
01:54:28PM 12 error. And, secondly, even if the Court were to  
01:54:32PM 13 find error, no harm whatsoever resulting in the  
01:54:34PM 14 denial of a fair trial to the defendant.

01:54:37PM 15 The Court did not allow any testimony  
01:54:40PM 16 from 2005 to be presented to the jury. The defense  
01:54:43PM 17 attorneys made use of that meeting and the legal  
01:54:48PM 18 controversy in front of the jury. During the trial  
01:54:51PM 19 the defense repeatedly referred to what he  
01:54:55PM 20 characterized as a secret meeting during the  
01:54:58PM 21 examination of Dr. Lyon and Detective Diskin.

01:55:03PM 22 And then in closing argument the defense  
01:55:07PM 23 emphasized the secret meeting during the guilt  
01:55:12PM 24 phase. The Court will recall that Mr. Li talked  
01:55:12PM 25 about how in America we don't have secret meetings.

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01:55:15PM 1 And maybe if you're in charge of Seal Team Six and  
01:55:18PM 2 you're going to capture and kill a terrorist,  
01:55:20PM 3 that's a good idea for a secret meeting, et cetera.  
01:55:23PM 4 And we quoted from the defendant's argument.

01:55:27PM 5 In summary, I believe that what is set  
01:55:30PM 6 forth in the motion misrepresents the facts  
01:55:32PM 7 surrounding the dispute over the December 14  
01:55:34PM 8 meeting and the nature of the PowerPoint. On this  
01:55:38PM 9 issue the defense cites no legal support for their  
01:55:41PM 10 argument that the state's good-faith assertion of  
01:55:44PM 11 the work-product privilege was somehow misconduct.  
01:55:47PM 12 They can show no harm, as all the information was  
01:55:51PM 13 subsequently disclosed and then none of it admitted  
01:55:53PM 14 at trial.

01:55:53PM 15 And then, finally, the defense did use  
01:55:56PM 16 the controversy over their access to the notes in  
01:56:02PM 17 the PowerPoint when they cross-examined witnesses  
01:56:06PM 18 and argued to the jury.

01:56:14PM 19 The next section that the defense argues  
01:56:18PM 20 in support of their motion for a new trial, I  
01:56:22PM 21 believe they captioned bad-faith positions by the  
01:56:28PM 22 state in the jury selection. That's set forth on  
01:56:28PM 23 page 6 of their motion.

01:56:32PM 24 And, essentially, they allege that the  
01:56:34PM 25 state did not seek to facilitate the selection of a

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01:56:38PM 1 jury that would be fair and impartial; that we  
01:56:40PM 2 sought to strike for cause the one juror who  
01:56:43PM 3 understood that the defendant is presumed innocent;  
01:56:47PM 4 that in voir dire that we asked the jury whether  
01:56:51PM 5 the defendant and the state would start on an equal  
01:56:55PM 6 playing field and that that was misconduct; that we  
01:56:58PM 7 moved for the Court's reconsideration of the  
01:57:00PM 8 Court's striking of three jurors, who had informed  
01:57:02PM 9 the Court that media exposure would interfere with  
01:57:06PM 10 their ability to be fair and impartial, which we  
01:57:08PM 11 did, but somehow that that is misconduct.

01:57:10PM 12 And they argue in the motion that we  
01:57:14PM 13 erroneously argued that the state has a  
01:57:18PM 14 constitutional due-process right against a criminal  
01:57:21PM 15 defendant or that the state can be a victim of  
01:57:23PM 16 structural error.

01:57:25PM 17 And I would just like to briefly touch on  
01:57:27PM 18 each of those. I don't believe any of those are  
01:57:29PM 19 error, Your Honor. I'd like to make a quick record  
01:57:31PM 20 on each of them.

01:57:34PM 21 The first issue was that we did not seek  
01:57:40PM 22 to facilitate the selection of a juror that would  
01:57:44PM 23 be fair and impartial. There is no truth to that  
01:57:46PM 24 and there is no evidence offered by the defense in  
01:57:48PM 25 support of that allegation.

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01:57:49PM 1 The second is that we sought to strike  
 01:57:53PM 2 for cause the one juror who understood the  
 01:57:56PM 3 defendant is presumed to be innocent. The defense  
 01:58:00PM 4 in the motion offered no citation to the record.  
 01:58:04PM 5 We do not know who that juror is that they're  
 01:58:08PM 6 referring to. But the state never moved to strike  
 01:58:12PM 7 any juror simply because that juror stated they  
 01:58:16PM 8 understood that a defendant is presumed to be  
 01:58:20PM 9 innocent. In fact, all of the jurors were  
 01:58:24PM 10 instructed, as they always are, that the defendant  
 01:58:28PM 11 is presumed to be innocent.

01:58:32PM 12 There is simply no error in that regard  
 01:58:36PM 13 nor any record or citation to a record by the  
 01:58:40PM 14 defense to support that incident as an error.

01:58:44PM 15 The defense says that the state erred  
 01:58:48PM 16 when we asked the jury in voir dire whether the  
 01:58:52PM 17 defendant and the state would start on an equal  
 01:58:56PM 18 playing field. They don't cite any legal authority  
 01:59:00PM 19 nor any cases to support that argument or the  
 01:59:04PM 20 argument that somehow that's an incorrect question  
 01:59:08PM 21 to ask of the jury.

01:59:12PM 22 The closest case that we could find is  
 01:59:16PM 23 the State versus Blackman, case cited in our  
 01:59:20PM 24 response at 201 Ariz. 527. And in that case a  
 01:59:24PM 25 prospective juror stated he would be looking for

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01:59:28PM 1 reasons to find the defendant not guilty and would  
 01:59:32PM 2 not be as objective as he would like to be. He  
 01:59:36PM 3 also stated that if testimony conflicted, he would  
 01:59:40PM 4 resolve it in favor of defendant. And the Court --  
 01:59:44PM 5 the trial Court had excused that juror for cause,  
 01:59:48PM 6 and the court of appeals upheld that.

01:59:52PM 7 But that's clearly an example of how the  
 01:59:56PM 8 parties are not starting on an equal playing field  
 01:59:59PM 9 in the mind of a prospective juror. I don't know.  
 02:00:03PM 10 I don't recall the defendant even objecting at the  
 02:00:07PM 11 time to that question by Mr. Hughes. But there is  
 02:00:11PM 12 no legal support at all nor any reasonable argument  
 02:00:15PM 13 that can be made that that somehow is an  
 02:00:19PM 14 objectionable question of the jury.

02:00:23PM 15 The defense has urged the Court to  
 02:00:27PM 16 consider the state's act in filing our motion for  
 02:00:31PM 17 reconsideration when the Court had struck three  
 02:00:35PM 18 jurors early on based on the written questionnaire.  
 02:00:39PM 19 We did file that motion. We have a right to file a  
 02:00:43PM 20 motion. And we certainly have a right to refer to  
 02:00:47PM 21 the rules and ask that trials proceed according to  
 02:00:51PM 22 the rules.

02:00:55PM 23 We had objected at the time. The Court  
 02:00:59PM 24 considered our motion for reconsideration, did not  
 02:01:03PM 25 grant it, but from their forward did allow oral

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02:00:57PM 1 voir dire. There is simply no legal support for  
 02:01:01PM 2 the argument that our filing a motion for  
 02:01:05PM 3 reconsideration is somehow error let alone  
 02:01:09PM 4 misconduct. And I would ask that -- the Court to  
 02:01:13PM 5 find that that is simply without merit.

02:01:17PM 6 The defense next argues in the motion  
 02:01:21PM 7 that the state erroneously argued that the state  
 02:01:25PM 8 has a constitutional due-process right against a  
 02:01:29PM 9 criminal defendant or that the state can be a  
 02:01:33PM 10 victim of structural error.

02:01:37PM 11 I think they are flat out wrong in that  
 02:01:41PM 12 argument. And they don't, again, point to any part  
 02:01:45PM 13 of the record to show the state making that  
 02:01:49PM 14 specific argument. What we did argue in our motion  
 02:01:53PM 15 for reconsideration was the State versus Anderson  
 02:01:57PM 16 case, which clearly provided that all parties are  
 02:02:01PM 17 entitled to have the rules of criminal procedure  
 02:02:05PM 18 fully and fairly enforced. And, in fact, the Court  
 02:02:09PM 19 did grant the relief we were requesting with  
 02:02:13PM 20 respect to the prospective jurors.

02:02:17PM 21 Requesting that the parties comply with  
 02:02:21PM 22 the rules of criminal procedure at any stage of a  
 02:02:25PM 23 criminal trial cannot be characterized as  
 02:02:29PM 24 misconduct. And, again, that incident alleged in  
 02:02:33PM 25 the motion to be misconduct should -- is without

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02:02:37PM 1 merit and should not be considered by this court.  
 02:02:41PM 2 On page 7 of the defendant's motion, they  
 02:02:45PM 3 refer to, quote, Brady violations. And they make a  
 02:02:49PM 4 statement, again, without any basis to support this  
 02:02:53PM 5 statement. This statement is made on page 7,  
 02:02:57PM 6 lines 5 to 6, of the motion. They wrote, quote,  
 02:03:01PM 7 there is simply no telling what else the state did  
 02:03:05PM 8 not disclose.

02:03:09PM 9 There is no basis in fact in the record  
 02:03:13PM 10 or anywhere else for the defense to make that  
 02:03:17PM 11 statement. As the Court knows, we have disclosed  
 02:03:21PM 12 in this case over 8,000 pages of supplemental  
 02:03:25PM 13 disclosures. The defense interviewed many of the  
 02:03:29PM 14 state's witnesses, visited the sheriff's office  
 02:03:33PM 15 evidence storage facility for a full day. The  
 02:03:37PM 16 detective pulled out everything they wanted to see  
 02:03:41PM 17 and subsequently made copies of many, many  
 02:03:45PM 18 documents. The state has complied with our Brady  
 02:03:49PM 19 obligations. And the Court should disregard that  
 02:03:53PM 20 and find that that's without merit as well.

02:03:57PM 21 The defense argues that the state  
 02:04:01PM 22 violated a Brady obligation to disclose certain  
 02:04:05PM 23 information about Rick Ross, who was one the  
 02:04:09PM 24 state's listed expert witnesses, who we decided  
 02:04:13PM 25 later not to call at trial.

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02 03 09PM 1 And as noted in the defendant's motion,  
 02 03 12PM 2 Mr. Ross had been disclosed as an expert witness.  
 02 03 15PM 3 And the state had disclosed his resume, and we have  
 02 03 18PM 4 provided notice of his prior felony conviction.  
 02 03 21PM 5 The defendant claims that we committed a Brady  
 02 03 24PM 6 violation when we did not disclose information  
 02 03 27PM 7 relating to Rick Ross's, quote, violent  
 02 03 30PM 8 deprogramming activity.

02 03 33PM 9 At the defendant's request, we made  
 02 03 36PM 10 Mr. Ross available for an interview. And during  
 02 03 39PM 11 that interview the defense questioned him  
 02 03 42PM 12 extensively regarding his past history, including  
 02 03 45PM 13 what they characterize as his violent deprogramming  
 02 03 48PM 14 activity.

02 03 49PM 15 And until that interview, Your Honor, the  
 02 03 51PM 16 state had no information relating to those  
 02 03 53PM 17 activities, which occurred in the late 1980's or  
 02 03 57PM 18 1990s. It's not clear why in the defendant's  
 02 04 01PM 19 motion for mistrial they believed that the state  
 02 04 03PM 20 had that information in our possession or control.  
 02 04 07PM 21 We did not, and there is no evidence to suggest  
 02 04 09PM 22 otherwise.

02 04 11PM 23 As the Court knows, Brady and Rule 15  
 02 04 13PM 24 apply to information in the state's possession or  
 02 04 16PM 25 control. And evidence is Brady and material only  
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02 04 20PM 1 if there is a reasonable probability that had the  
 02 04 23PM 2 evidence been disclosed to the defendant, the  
 02 04 25PM 3 result of the proceeding would have been different.  
 02 04 28PM 4 Clearly there is no Brady issue with regard to Rick  
 02 04 32PM 5 Ross.

02 04 33PM 6 It's also clear that no prejudice could  
 02 04 35PM 7 have resulted to the defendant when the record  
 02 04 38PM 8 shows that the defense had the opportunity and did  
 02 04 41PM 9 a full interview of Mr. Ross prior to trial, that  
 02 04 45PM 10 they clearly knew about information that, in fact,  
 02 04 47PM 11 the state did not know about at the time. They had  
 02 04 50PM 12 that in their possession at the time of the  
 02 04 52PM 13 interview. And in any event, the state did not  
 02 04 54PM 14 call Mr. Ross. So that there can be absolutely no  
 02 04 57PM 15 prejudice resulting with issues.

02 05 01PM 16 That's another issue, Your Honor, that  
 02 05 03PM 17 the state -- that the defense lists in their motion  
 02 05 06PM 18 as prosecutorial misconduct, which, I believe,  
 02 05 09PM 19 there is simply no record and no support of error  
 02 05 13PM 20 let alone prosecutorial misconduct.

02 05 19PM 21 On page 9 of the defendant's motion, they  
 02 05 22PM 22 allege that the state disregarded Brady obligations  
 02 05 25PM 23 in connection with our testing of the victims'  
 02 05 32PM 24 blood for the presence of organophosphates. Again,  
 02 05 36PM 25 I believe there is no basis in the record to

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02 05 38PM 1 support that the state disregarded any Brady  
 02 05 40PM 2 obligation in this regard.

02 05 43PM 3 Assuming for the sake of argument that  
 02 05 45PM 4 there somehow was a Brady violation, the defendant  
 02 05 48PM 5 can show no harm resulting. The defendant's  
 02 05 51PM 6 argument is that the state learned on February 25,  
 02 05 54PM 7 that Dr. Blum, from the lab, had concerns regarding  
 02 05 58PM 8 the validity of the test that the lab had done on  
 02 06 03PM 9 the victims' blood for organophosphates and that we  
 02 06 07PM 10 did not disclose those concerns until March 2 and,  
 02 06 10PM 11 therefore, that we disregarded our Brady  
 02 06 12PM 12 obligation.

02 06 14PM 13 This is simply not true. And the record  
 02 06 17PM 14 does not support the argument in defendant's motion  
 02 06 24PM 15 that the state disregarded any Brady obligation in  
 02 06 27PM 16 this regard.

02 06 28PM 17 The short summary of our response to this  
 02 06 30PM 18 incident or suggestion of error or prosecutorial  
 02 06 36PM 19 misconduct is that February 25 to March 2 is a  
 02 06 38PM 20 period of five days, two of which were the weekend.  
 02 06 43PM 21 February 25 was a Friday, and we were in trial. We  
 02 06 47PM 22 had two working days to follow up on Dr. Blum's  
 02 06 50PM 23 concern while we were preparing for opening  
 02 06 53PM 24 statements to begin on Tuesday March 1.

02 06 56PM 25 On Wednesday, March 2, we hand delivered  
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02 06 59PM 1 a letter to the defense attorneys outlining  
 02 07 02PM 2 Dr. Blume's concerns. It's simply unfounded to  
 02 07 05PM 3 suggest our actions in this regard constitutes a  
 02 07 08PM 4 disregard for our Brady obligations.

02 07 10PM 5 It's also clear, Your Honor, that the  
 02 07 13PM 6 defendant suffered no prejudice from the state's  
 02 07 14PM 7 delay from February 25 until March 2 in notifying  
 02 07 18PM 8 the defendant that Dr. Blume had concerns about the  
 02 07 22PM 9 validity of the test.

02 07 26PM 10 THE COURT: Ms. Polk, just to clear up one  
 02 07 28PM 11 thing in terms of chronology, the disclosure  
 02 07 32PM 12 happened after Mr. Li completed his opening;  
 02 07 35PM 13 correct?

02 07 36PM 14 MS. POLK: Yes, it did, Your Honor.

02 07 37PM 15 THE COURT: You may continue.

02 07 38PM 16 MS. POLK: And I'll just make a note that it  
 02 07 39PM 17 was in Mr. Li's opening that he -- the state first  
 02 07 42PM 18 learned that organophosphates was going to be a  
 02 07 44PM 19 defense.

02 07 52PM 20 In fact, as the Court knows, the state  
 02 07 54PM 21 did not know of the organophosphate defense at all  
 02 07 58PM 22 until we interviewed Dr. Paul on January 31  
 02 08 03PM 23 of 2011, 16 days prior to the start of the trial,  
 02 08 06PM 24 and that following that interview the state  
 02 08 08PM 25 requested that the blood samples of Kirby Brown and

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02 08 11PM 1 James Shore be tested for organophosphates; that on  
 02 08 15PM 2 February 4 of 2011, the state disclosed to the  
 02 08 20PM 3 defense a faxed transmittal letter from  
 02 08 24PM 4 Detective Diskin to Cindy Ross at the Yavapai  
 02 08 28PM 5 County Medical Examiner's Office requesting she  
 02 08 30PM 6 send specimens from James Shore and Kirby Brown to  
 02 08 34PM 7 the lab for testing.

02 08 34PM 8 So accordingly the defense was on notice  
 02 08 36PM 9 that the state had requested the test as of  
 02 08 38PM 10 February 4, that on February 15 the state received  
 02 08 40PM 11 and disclosed the results of the test which had  
 02 08 42PM 12 been completed by NMS Labs indicating that no  
 02 08 44PM 13 organophosphates had been detected.

02 08 44PM 14 We disclosed the results and added a  
 02 08 46PM 15 toxicologist from NMS Labs to be identified to our  
 02 08 48PM 16 witness list, that on February 23rd of 2011 our  
 02 08 50PM 17 office contacted the lab to determine who the  
 02 08 52PM 18 appropriate trial witness would be and the process  
 02 08 54PM 19 necessary to arrange the appearance at trial.

02 08 54PM 20 And then later that day the lab called  
 02 08 56PM 21 back, indicated that Dr. Blume wanted to talk about  
 02 08 58PM 22 the test results to the prosecutor. And so a  
 02 09 00PM 23 telephonic discussion was set for February 25 at  
 02 09 02PM 24 7:00 a.m. That's that Friday, February 25.

02 09 04PM 25 Deputy County Attorney Bill Hughes  
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02 09 35PM 1 conducted the call with Dr. Blume. In fact, we  
 02 09 37PM 2 were in the vehicle driving over here for trial and  
 02 09 40PM 3 learned of Dr. Blume's concerns relating to the  
 02 09 43PM 4 stability of organophosphates in the blood due to  
 02 09 46PM 5 the passage of time.

02 09 48PM 6 Dr. Blume indicated that the manner in  
 02 09 50PM 7 which the specimens were stored could also be a  
 02 09 53PM 8 factor. We spent the day in trial here in court.  
 02 09 57PM 9 And then the following Monday Ms. Durrer, from my  
 02 10 01PM 10 office, contacted Ms. Ross at the medical  
 02 10 06PM 11 examiner's office to find out how the blood had  
 02 10 08PM 12 been stored and whether additional specimens might  
 02 10 12PM 13 have been frozen and preserved. At that time we  
 02 10 14PM 14 didn't know how the specimens had been stored.

02 10 16PM 15 Ms. Ross then contacted Dr. Blume the  
 02 10 18PM 16 same day, Monday, to discuss the possibility of  
 02 10 22PM 17 testing for organophosphates and frozen tissue.  
 02 10 24PM 18 And Dr. Blume again expressed his concern about the  
 02 10 28PM 19 effect of the passage of time regardless of how  
 02 10 30PM 20 they were stored, just the effect of passage of  
 02 10 33PM 21 time on the stability of the specimens. And then  
 02 10 35PM 22 on February 2 we hand delivered a letter to the  
 02 10 38PM 23 defense disclosing what Dr. Blume had told us.

02 10 42PM 24 I don't believe there is any basis to  
 02 10 44PM 25 argue from this record that the state was dilatory

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02 10 47PM 1 in disclosing to the defense Dr. Blume's concerns.  
 02 10 51PM 2 But assuming just for the sake of argument that  
 02 10 54PM 3 that period of two days, two working days, that we  
 02 10 58PM 4 took to notify the defendant about Dr. Blume's  
 02 11 03PM 5 concern, assuming for the sake of argument that  
 02 11 07PM 6 that can be construed as too long, I believe the  
 02 11 09PM 7 record is clear that the defendant suffered no  
 02 11 12PM 8 prejudice as a result.

02 11 14PM 9 As the Court knows, the defense had kept  
 02 11 17PM 10 the defense of organophosphate poisoning from the  
 02 11 21PM 11 state. We've been very up front letting both the  
 02 11 23PM 12 Court and jury know when and how we learned about  
 02 11 26PM 13 it. The Court knows that the organophosphates was  
 02 11 28PM 14 not in the report of Dr. Paul, their expert.

02 11 32PM 15 We have made a record of the state's  
 02 11 34PM 16 repeated request to interview Dr. Paul and that we  
 02 11 37PM 17 didn't get to interview him until just two weeks  
 02 11 40PM 18 before trial started. And we made a record of the  
 02 11 43PM 19 fact that we learned of the organophosphate issue  
 02 11 47PM 20 only when Mr. Hughes asked Dr. Paul if he had other  
 02 11 51PM 21 theories to explain the cause of death of the  
 02 11 53PM 22 victims.

02 11 54PM 23 At that point the state acted as quickly  
 02 11 56PM 24 as possible to follow up on the information. And  
 02 11 58PM 25 we notified the defense that we were doing so. So  
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02 12 03PM 1 the moment we set into action the testing, we  
 02 12 06PM 2 notified the defense that we were doing the  
 02 12 09PM 3 testing.

02 12 09PM 4 Secondly, it would appear from the  
 02 12 12PM 5 record, Your Honor, that the defense knew all along  
 02 12 14PM 6 that the results of the state's test for the blood  
 02 12 17PM 7 17 months after the death of the victims would not  
 02 12 20PM 8 be valid.

02 12 21PM 9 On April 29 of 2011, during oral argument  
 02 12 27PM 10 Mr. Li told this court he had documentation in his  
 02 12 30PM 11 file that the toxins would only remain in a  
 02 12 33PM 12 person's system for three days. And I would refer  
 02 12 36PM 13 the Court to the trial transcript of 4/29/11,  
 02 12 42PM 14 page 59, lines 21 to 60.

02 12 49PM 15 And, third, the fact that the blood of  
 02 12 52PM 16 the victims was not tested during the period that  
 02 12 56PM 17 apparently an accurate result was possible was  
 02 13 00PM 18 presented to the jury during trial. That was one  
 02 13 03PM 19 of the factors ultimately that the defense used to  
 02 13 06PM 20 argue in favor of a Willits instruction. And the  
 02 13 10PM 21 Court did, in fact, give the jury the Willits  
 02 13 13PM 22 instruction.

02 13 19PM 23 I would refer the Court to the  
 02 13 21PM 24 defendant's request for the Willits instruction  
 02 13 23PM 25 filed on June 10 of 2011 at page 6 where they

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02 13 29PM 1 argued that very fact, that the testing of the  
02 13 33PM 2 decedents' blood samples at a time when  
02 13 37PM 3 organophosphates could still be detected was  
02 13 41PM 4 material and potentially exonerating and used that  
02 13 45PM 5 to get a Willits instruction for the jury.

02 13 48PM 6 So given the above record, Your Honor, I  
02 13 50PM 7 believe the record is clear that the defendant  
02 13 52PM 8 suffered no prejudice from the state's delay.  
02 13 55PM 9 Again, we're talking about February 25 to March 2,  
02 13 59PM 10 a period of five days, two of which are weekend, so  
02 14 03PM 11 from Friday until the following Wednesday to notify  
02 14 07PM 12 the defendant that Dr. Blume had concerns about the  
02 14 11PM 13 stability.

02 14 18PM 14 Moving on to the next incident that the  
02 14 20PM 15 defense alleges is prosecutorial misconduct, it's  
02 14 25PM 16 found on page 9 of the defendant's motion, where  
02 14 30PM 17 the -- it is written that the defendant alleges  
02 14 36PM 18 that Dr. Mosley's opinion expressed to the state in  
02 14 40PM 19 March that testing for organophosphates after the  
02 14 42PM 20 significant passage of time would be a waste of  
02 14 45PM 21 money, was Brady material, and the state's failure  
02 14 48PM 22 to disclose it to defendant before their interview  
02 14 51PM 23 of Mosley on April 18 was misconduct.

02 14 55PM 24 First of all, Your Honor, there is no  
02 14 57PM 25 legal support cited by the defendant in the motion  
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02 15 01PM 1 for new trial that Dr. Mosley's opinion is somehow  
02 15 07PM 2 Brady. Nor is there a legal support for the  
02 15 10PM 3 argument that we had an obligation to disclose that  
02 15 12PM 4 opinion before his interview.

02 15 14PM 5 The defense interviewed Dr. Mosley four  
02 15 20PM 6 times prior to his testimony. They interviewed him  
02 15 24PM 7 first on May 21st of 2010; again, on January 6,  
02 15 31PM 8 2011. They interviewed him on April 18, 2011, and  
02 15 37PM 9 again on April 19, 2011.

02 15 46PM 10 I don't believe that any Court would find  
02 15 48PM 11 that that fact scenario described above somehow  
02 15 52PM 12 constitutes a Brady violation. Brady and it's  
02 15 57PM 13 progeny hold that a defendant has due-process right  
02 16 00PM 14 to disclosure of material, exculpatory evidence.  
02 16 03PM 15 And the standard is whether the evidence is  
02 16 06PM 16 material to the issue of guilt or innocence.  
02 16 07PM 17 Evidence is material only if there is a reasonable  
02 16 10PM 18 probability that had the evidence been disclosed to  
02 16 13PM 19 the defendant, the results of the proceeding would  
02 16 15PM 20 have been different.

02 16 17PM 21 The defense has not made nor can a record  
02 16 23PM 22 be made nor credible argument be made that the  
02 16 27PM 23 timing within which they learned that Dr. Mosley  
02 16 30PM 24 believed it would be a waste of time to test the  
02 16 30PM 25 victims' blood after 17 months somehow affected the

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02 16 34PM 1 outcome of this trial. Because clearly it did not.

02 16 38PM 2 And the same analysis that I just argued  
02 16 41PM 3 to this court about the state's disclosure of  
02 16 46PM 4 Dr. Blume's concerns would also apply to their  
02 16 50PM 5 argument that we had a Brady obligation with regard  
02 16 50PM 6 to Dr. Mosley's opinions.

02 16 59PM 7 First, the information was presented  
02 17 01PM 8 during the cross-examination of Dr. Mosley. The  
02 17 04PM 9 defendant admitted Exhibit 1001, which is  
02 17 08PM 10 Dr. Mosley's letter or email wherein he uses those  
02 17 13PM 11 words, that he believes it was a waste of time to  
02 17 16PM 12 have that blood tested after 17 months. And they  
02 17 19PM 13 examined Dr. Mosley at length regarding its  
02 17 23PM 14 contents. And that's set forth on the trial  
02 17 25PM 15 transcript of May 6, 2011, on page 67.

02 17 32PM 16 The defense examined Dr. Mosley to  
02 17 36PM 17 emphasize to the jury that the state had failed to  
02 17 39PM 18 preserve the blood samples taken when Ms. Neuman  
02 17 43PM 19 was admitted to the Flagstaff Medical Center.

02 17 47PM 20 And, third, the argument that I've  
02 17 49PM 21 already made that Mr. Li told this court on  
02 17 51PM 22 April 29, 2011, during oral argument that he had  
02 17 55PM 23 documentation in his file that the toxin would  
02 17 58PM 24 remain in a person's system for three days  
02 18 01PM 25 indicating that that was information that the  
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02 18 03PM 1 defense already had.

02 18 05PM 2 And then, finally, the defense again used  
02 18 11PM 3 that information to instruct the jury or get an  
02 18 12PM 4 instruction on Willits.

02 18 13PM 5 Given this record, I don't believe the  
02 18 16PM 6 defendant can show any prejudice in any way by the  
02 18 18PM 7 timing of the state's disclosure of any of the  
02 18 22PM 8 these opinions about organophosphate testing.

02 18 27PM 9 The next issue that the defense raises  
02 18 30PM 10 and claims as prosecutorial misconduct in the  
02 18 32PM 11 motion appears on page 9 of the defendant's motion  
02 18 36PM 12 for new trial. And that's where it is alleged that  
02 18 41PM 13 the county attorney, me, personally learned  
02 18 44PM 14 exculpatory information from Dawn Sy, our DPS  
02 18 49PM 15 criminalist, in April of 2011. And it's implied in  
02 18 53PM 16 the motion that based on this exculpatory  
02 18 58PM 17 information that I allegedly learned that we then  
02 19 00PM 18 eliminated her from our witness list.

02 19 02PM 19 I believe the Court knows that that is  
02 19 04PM 20 simply untrue and not supported by the record.  
02 19 07PM 21 First, it's an untenable argument. And the facts  
02 19 11PM 22 do not support any Brady violation. The state had  
02 19 14PM 23 made full disclosure of Dawn Sy's report, her lab  
02 19 19PM 24 notes and everything that the defense had requested  
02 19 21PM 25 of Dawn Sy or the lab well before trial.

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02 19 24PM 1 We had made her available early on for a  
 02 19 28PM 2 defense interview. When the defense interviewed  
 02 19 31PM 3 her, they interviewed her extensively about the lab  
 02 19 34PM 4 tests with the state present and apparently  
 02 19 37PM 5 interviewed her a second time without the state  
 02 19 39PM 6 being present. And then they called her as a trial  
 02 19 41PM 7 witness without disclosing to the state ahead of  
 02 19 44PM 8 time whatever was said during that second interview  
 02 19 46PM 9 when we were not present.

02 19 48PM 10 I think the record is clear that the  
 02 19 51PM 11 defense knew when they interviewed Ms. Sy about the  
 02 19 55PM 12 organophosphates defense. They chose not to ask  
 02 19 58PM 13 her about whether the test she ran would detect  
 02 20 01PM 14 organophosphates or pesticides. Yet now they claim  
 02 20 06PM 15 the state had a Brady obligation to contact the  
 02 20 09PM 16 defense when we asked her in a pretrial preparation  
 02 20 13PM 17 context that question. And the answer from Ms. Sy  
 02 20 16PM 18 was simply that she did not know.

02 20 21PM 19 These facts, Your Honor, under any  
 02 20 24PM 20 scenario would never support a finding of a Brady  
 02 20 28PM 21 violation. Again, Brady and its progeny  
 02 20 32PM 22 specifically focus on the defendant's due-process  
 02 20 35PM 23 rights to disclosure of material exculpatory  
 02 20 38PM 24 evidence. And the inquiry is whether or not there  
 02 20 43PM 25 is a reasonable probability that had the evidence

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02 20 46PM 1 been disclosed to the defendant, the result of the  
 02 20 48PM 2 proceeding would have been different.

02 20 49PM 3 The facts do not support a credible  
 02 20 51PM 4 argument that the fact that the DPS crime lab  
 02 20 54PM 5 criminalist did not know whether the test she ran  
 02 20 57PM 6 could test for organophosphates or poisons --  
 02 21 01PM 7 pesticides somehow affected the outcome of this  
 02 21 03PM 8 trial because clearly they did not.

02 21 05PM 9 Second, in the defendant's motion for  
 02 21 08PM 10 mistrial, the nature of the state's conversation  
 02 21 12PM 11 with Ms. Sy in April of 2011 is mischaracterized.  
 02 21 18PM 12 The purpose of the state's conversation in April  
 02 21 21PM 13 with Ms. Sy was pretrial preparation in accordance  
 02 21 25PM 14 with the standard procedure of contacting a witness  
 02 21 27PM 15 prior to their testifying, to review the scope of  
 02 21 30PM 16 their testimony and to introduce the witness to the  
 02 21 33PM 17 prosecutor.

02 21 34PM 18 It was not unreasonable for the state, by  
 02 21 36PM 19 that time aware of the organophosphates defense, to  
 02 21 40PM 20 inquire of Ms. Sy whether she could test for them.

02 21 43PM 21 The defendant's motion for mistrial also  
 02 21 51PM 22 misrepresents the nature of the state's decision  
 02 21 54PM 23 not to call Dawn Sy and improperly suggested it to  
 02 21 56PM 24 the jury as well. And I believe the Court will  
 02 21 58PM 25 recall that the state fully intended to call Ms. Sy

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02 22 01PM 1 as a trial witness, that following our conversation  
 02 22 04PM 2 with her in April of 2011, we had scheduled her to  
 02 22 08PM 3 testify on May 6 of 2011. I believe the Court  
 02 22 12PM 4 knows that she came to the courthouse and remained  
 02 22 15PM 5 here the entire day waiting to testify.

02 22 19PM 6 Dr. Mosley's testimony took longer than  
 02 22 22PM 7 scheduled, and Ms. Sy did not make it to the stand  
 02 22 24PM 8 on May 6, 2011. She did have a vacation in Hawaii  
 02 22 28PM 9 that was scheduled for the following two weeks.  
 02 22 31PM 10 And due to the length of the trial, the limited  
 02 22 34PM 11 number of remaining trial days and because the DPS  
 02 22 37PM 12 report, as well as Dawn Sy's notes, had already  
 02 22 41PM 13 been admitted during the testimony of  
 02 22 43PM 14 Detective Diskin and because Dr. Dickson had  
 02 22 46PM 15 testified about the chemicals identified in her  
 02 22 49PM 16 report, the state decided we no longer needed to  
 02 22 53PM 17 call her as a witness.

02 22 54PM 18 But it is a false implication in the  
 02 22 58PM 19 defendant's motion for mistrial to suggest that we  
 02 22 59PM 20 made the decision to withdraw her as a witness  
 02 23 02PM 21 because we had somehow learned something from her  
 02 23 04PM 22 that was exculpatory. There is no basis for that.

02 23 14PM 23 The fact that the state had Ms. Sy drive  
 02 23 18PM 24 from Phoenix to the courthouse on May 6 and remain  
 02 23 20PM 25 the entire day so she could testify following

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02 23 21PM 1 Dr. Mosley belies the suggestion that somehow we  
 02 23 24PM 2 had learned exculpatory information from her in  
 02 23 28PM 3 April, a month before we had her come up to the  
 02 23 32PM 4 courthouse and therefore withdrawn her as a  
 02 23 34PM 5 witness.

02 23 36PM 6 We would also note, Your Honor, that the  
 02 23 38PM 7 defense used Ms. Sy's report and her notes  
 02 23 40PM 8 extensively during trial to argue that there were  
 02 23 43PM 9 pesticides present on the tarps that were tested.  
 02 23 47PM 10 And we would note that the defense had used the  
 02 23 51PM 11 defendant -- the state's decision not to call  
 02 23 53PM 12 Ms. Sy to the stand -- had used that information to  
 02 23 58PM 13 imply to the jury that the state had attempted to  
 02 23 58PM 14 keep Dawn Sy's testimony from the jury.

02 24 01PM 15 I believe the Court will recall in  
 02 24 04PM 16 Mr. Li's closing arguments, he made the following  
 02 24 06PM 17 comments relating to the state's failure to call  
 02 24 08PM 18 Ms. Sy: Why does Mr. Ray, who doesn't work for the  
 02 24 13PM 19 State of Arizona, doesn't have the resources -- why  
 02 24 15PM 20 is it that Mr. Ray has got to get the state  
 02 24 18PM 21 employee in here to testify about what she found in  
 02 24 21PM 22 the labs?

02 24 21PM 23 And then they argue is that how you want  
 02 24 22PM 24 to your government to work? Or is the answer  
 02 24 36PM 25 actually that what Dawn Sy had to stay isn't

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02:24:38PM 1 helpful to the case for the state. Is it possible  
 02:24:40PM 2 that the state didn't call her because Dawn Sy  
 02:24:43PM 3 would give you that real possibility that Mr. Ray  
 02:24:46PM 4 didn't kill these folks?

02:24:49PM 5 And that occurred June 17, 2011. It's  
 02:24:51PM 6 set forth in Exhibit D to the state's motion, the  
 02:24:55PM 7 trial transcript at page 60, lines 4 to 61.

02:25:01PM 8 In short, Your Honor, there is simply no  
 02:25:03PM 9 support in the record that there was any misconduct  
 02:25:06PM 10 by the state in that regard and clearly no  
 02:25:09PM 11 prejudice to the defendant for the state's  
 02:25:12PM 12 nondisclosure of a conversation with Ms. Sy simply  
 02:25:16PM 13 telling the state that she didn't know whether or  
 02:25:18PM 14 not the lab could test for pesticides.

02:25:23PM 15 Moving on to the next issue that the  
 02:25:26PM 16 defense has alleged in the motion is grounds for a  
 02:25:30PM 17 new trial and was prosecutorial misconduct set  
 02:25:36PM 18 forth in the defendant's motion in the section  
 02:25:39PM 19 where they talk about civil lawsuits and  
 02:25:41PM 20 impeachment evidence, and the defense wrote in the  
 02:25:47PM 21 motion that the state, quote, took a cavalier  
 02:25:50PM 22 approach to the disclosure of impeachment evidence  
 02:25:53PM 23 throughout the trial. That's untrue, Your Honor.  
 02:25:55PM 24 There is no record to support that statement.

02:25:59PM 25 In support of that argument, they argue  
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02:26:02PM 1 in the motion that the state objected to the  
 02:26:06PM 2 defendant's failure to disclose lawsuits that they  
 02:26:11PM 3 used to impeach prosecution witnesses and that it  
 02:26:14PM 4 was error when we moved to compel the defendant to  
 02:26:17PM 5 disclose the lawsuits. And they alleged that the  
 02:26:20PM 6 state made false statements to this court about the  
 02:26:22PM 7 state's knowledge of those lawsuits.

02:26:25PM 8 I want to address both of those  
 02:26:27PM 9 allegations that are made in the defendant's motion  
 02:26:29PM 10 and make a record that both of those are simply  
 02:26:33PM 11 unsupported by the record and not true. As the  
 02:26:37PM 12 Court will recall, the issue of the use of civil  
 02:26:39PM 13 lawsuits first arose during trial during  
 02:26:42PM 14 cross-examination of a witness when the defense  
 02:26:47PM 15 used a lawsuit that had not been disclosed to the  
 02:26:51PM 16 state.

02:26:51PM 17 The Court will recall that the state was  
 02:26:53PM 18 taken by surprise because we were not aware that  
 02:26:56PM 19 the defense intended to impeach the witness with  
 02:26:59PM 20 the lawsuit. And, again, it had not been disclosed  
 02:27:01PM 21 to us. We objected at the time to the defense's  
 02:27:06PM 22 use of the lawsuit to impeach without prior  
 02:27:09PM 23 disclosure. And at the time the defense had agreed  
 02:27:12PM 24 to withdraw the use of the lawsuit until the issue  
 02:27:12PM 25 could be resolved.

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02:27:14PM 1 On March 24 the state filed a motion to  
 02:27:16PM 2 compel the disclosure of the lawsuits that they  
 02:27:19PM 3 intended to use to impeach trial witnesses. There  
 02:27:23PM 4 were -- we could find, Your Honor, two discussions  
 02:27:27PM 5 that we had with the Court about the lawsuits --  
 02:27:28PM 6 one on March 22nd, when the issue came up during  
 02:27:31PM 7 the defendant's cross-examination of a witness  
 02:27:35PM 8 using the lawsuit that had not been disclosed to  
 02:27:39PM 9 the state. And during a sidebar on March 22nd -- I  
 02:27:43PM 10 believe it was a sidebar -- I had told the Court I  
 02:27:45PM 11 did not know about the lawsuit pertaining to that  
 02:27:48PM 12 witness, but I made it clear to the Court and  
 02:27:50PM 13 counsel at the time that we were generally aware  
 02:27:53PM 14 that lawsuits had been filed.

02:27:56PM 15 That conversation has been parsed in the  
 02:28:00PM 16 defendant's motion to suggest that I made a  
 02:28:02PM 17 misrepresentation to the Court when I said that I  
 02:28:05PM 18 was not aware of the lawsuit. There is simply no  
 02:28:14PM 19 basis for the defense to advance that as an  
 02:28:17PM 20 argument for error let alone prosecutorial  
 02:28:20PM 21 misconduct.

02:28:20PM 22 The other argument that is made in the  
 02:28:24PM 23 defendant's motion is that the state's conduct in  
 02:28:24PM 24 objecting to the defendant's failure to disclose  
 02:28:27PM 25 the lawsuits that they used to impeach prosecution

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02:28:30PM 1 witnesses and that our motion to compel them to  
 02:28:34PM 2 disclose the lawsuits was misconduct. So, again,  
 02:28:37PM 3 they're arguing that our act of filing a motion to  
 02:28:40PM 4 compel and our objection to their failure to  
 02:28:44PM 5 disclose the lawsuits somehow was error and  
 02:28:48PM 6 prosecutorial misconduct. Again, there is no basis  
 02:28:51PM 7 in fact or in law to advance that argument to the  
 02:28:55PM 8 Court.

02:28:56PM 9 I would remind the Court that we filed  
 02:28:58PM 10 our motion to compel disclosure of the lawsuit that  
 02:29:01PM 11 the defense intended to use to impeach trial  
 02:29:04PM 12 witnesses the day after we were caught by surprise  
 02:29:08PM 13 by their use of a lawsuit during cross-examination  
 02:29:11PM 14 without prior disclosure.

02:29:13PM 15 The defense filed a motion to compel  
 02:29:15PM 16 disclosure of Brady material arguing that the state  
 02:29:18PM 17 had the obligation to seek out and disclose those  
 02:29:21PM 18 lawsuits. And ultimately the Court denied both of  
 02:29:26PM 19 those motions. The Court denied the state's motion  
 02:29:29PM 20 to compel and the defendant's motion to compel.  
 02:29:32PM 21 The Court denied both of them on April 19.

02:29:37PM 22 So to argue now that the state's act in  
 02:29:40PM 23 filing those motions or an advance of an argument  
 02:29:43PM 24 somehow is misconduct is not supported by the  
 02:29:46PM 25 record. And, again, with many of the incidents

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02:29:48PM 1 that the defense has alleged are acts of misconduct  
 02:29:52PM 2 and prosecutorial misconduct, there is simply no  
 02:29:56PM 3 legal support offered to advance their arguments.  
 02:30:00PM 4 And this is another one of them.

02:30:04PM 5 As the Court will recall, the defense  
 02:30:08PM 6 used the civil complaints filed by participants to  
 02:30:12PM 7 impeach numerous witnesses. And I don't want to  
 02:30:16PM 8 rehash here the issue, Your Honor, of who had the  
 02:30:20PM 9 obligation to disclose, to obtain or disclose. But  
 02:30:24PM 10 suffice it to say that the record is clear that the  
 02:30:28PM 11 defense had knowledge of and access to those  
 02:30:32PM 12 lawsuits and, in fact, used them both in  
 02:30:36PM 13 cross-examining the state's witnesses and in  
 02:30:40PM 14 arguing to the jury in closing that witnesses had a  
 02:30:44PM 15 motive to testify against the defendant.

02:30:48PM 16 So assuming for the sake of argument that  
 02:30:52PM 17 we had some obligation to seek out lawsuits but  
 02:30:56PM 18 again not our possession or control -- but assuming  
 02:31:00PM 19 for the sake of argument that we had some sort of  
 02:31:04PM 20 obligation, there is just no evidence that the  
 02:31:08PM 21 defendant was prejudiced in any way.

02:31:12PM 22 On page 11 of defendant's motion for  
 02:31:16PM 23 mistrial, the following is stated: They allege,  
 02:31:20PM 24 quote, that virtually every week of trial revealed  
 02:31:24PM 25 new information the state had failed to disclose

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02:31:28PM 1 timely. This is before trial, close quote.

02:31:32PM 2 That is another allegation very sweeping  
 02:31:36PM 3 in nature that is simply unsupported by the record.  
 02:31:40PM 4 Under that caption the defense cites only two  
 02:31:44PM 5 examples after making that broad, sweeping  
 02:31:48PM 6 allegation that virtually every week there was new  
 02:31:52PM 7 information that we failed to disclose. They cite  
 02:31:56PM 8 only two examples claiming that both of those  
 02:32:00PM 9 examples are misconduct. And they pertain to  
 02:32:04PM 10 interviews that the state did of witnesses after  
 02:32:08PM 11 the trial had begun.

02:32:12PM 12 The trial lasted almost four months.  
 02:32:16PM 13 That's about 16 weeks. And to write in the motion  
 02:32:20PM 14 that virtually every week we failed to timely  
 02:32:24PM 15 disclose and then give two examples would certainly  
 02:32:28PM 16 be an indication that that is simply not supported  
 02:32:32PM 17 by the record.

02:32:36PM 18 I'll address the two examples that they  
 02:32:40PM 19 give in the motion because neither one is grounds  
 02:32:44PM 20 to believe any error occurred at all let alone  
 02:32:48PM 21 prosecutorial misconduct.

02:32:52PM 22 The two examples that the defense cites  
 02:32:56PM 23 in the motion are, one, that we interviewed the  
 02:33:00PM 24 Hamiltons in March 2011 about their policy against  
 02:33:04PM 25 the use of toxins on their property and that we

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02:32:38PM 1 interviewed Dr. Kent in April of 2011. And  
 02:32:42PM 2 Dr. Kent, as you will recall, was a Spiritual  
 02:32:46PM 3 Warrior participant from 2008.

02:32:50PM 4 The motion filed by the defense cites no  
 02:32:54PM 5 legal authority whatsoever to support the argument  
 02:32:58PM 6 that the state cannot continue to investigate  
 02:33:02PM 7 issues as they arise during trial nor does the law  
 02:33:06PM 8 prohibit such conduct by the state.

02:33:10PM 9 In fact, the law specifically  
 02:33:14PM 10 contemplates that parties may use material and  
 02:33:18PM 11 information not disclosed seven days prior to trial  
 02:33:22PM 12 provided we obtain leave of court. And that's in  
 02:33:26PM 13 Rule 15.6(d). That specifically contemplates that  
 02:33:30PM 14 new material will arise during trial and lays out  
 02:33:34PM 15 the procedure for the parties to file should we  
 02:33:38PM 16 wish to use that information in the trial itself.

02:33:42PM 17 And with respect to both the Hamiltons  
 02:33:46PM 18 and Dr. Kent, two examples advanced in the  
 02:33:50PM 19 defendant's motion to somehow illustrate  
 02:33:54PM 20 misconduct, we follow that procedure laid out in  
 02:33:58PM 21 15.6. In fact, during trial we filed three motions  
 02:34:02PM 22 pursuant to Rule 15.6. The first was on March 14  
 02:34:06PM 23 of 2011 where we sought to use information that we  
 02:34:10PM 24 had received the previous week relating to the  
 02:34:14PM 25 defendant's unauthorized use of the Samurai Game

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02:34:18PM 1 and the Holotropic Breathwork. The Court denied  
 02:34:22PM 2 that motion, and we did not use it at trial.

02:34:26PM 3 The second motion we filed was --  
 02:34:30PM 4 pursuant to 15.6 was March 28 of 2011, when the  
 02:34:34PM 5 state filed a motion requesting to use information  
 02:34:38PM 6 about the articles of incorporation and annual list  
 02:34:42PM 7 for James Ray International that we had received  
 02:34:46PM 8 from the Nevada Secretary of State's office. And  
 02:34:50PM 9 that request the Court granted.

02:34:54PM 10 And then the third motion we filed was on  
 02:34:58PM 11 March 24, 2011, when we filed a motion requesting  
 02:35:02PM 12 to use information relating to the brands and types  
 02:35:06PM 13 of poisons and pesticides used at the Angel Valley  
 02:35:10PM 14 Spiritual Retreat Center prior to and during the  
 02:35:14PM 15 Spiritual Warrior 2009 event.

02:35:18PM 16 In that motion the state informed this  
 02:35:22PM 17 court and defendant that based on the defendant's  
 02:35:26PM 18 opening statements and questioning of witnesses we  
 02:35:30PM 19 were seeking to discover information related to any  
 02:35:34PM 20 pesticides or poisons used at Angel Valley Retreat  
 02:35:38PM 21 Center. We also informed the parties that we were  
 02:35:42PM 22 seeking to discover information relating to the  
 02:35:46PM 23 composition of the logs burned to heat the rocks  
 02:35:50PM 24 during the October 8, 2009, ceremony.

02:35:54PM 25 And, finally, in that motion we informed  
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02 35 17PM 1 the Court and defendant that in response to an  
02 35 19PM 2 inquiry from the state, that Mrs. Hamilton had sent  
02 35 24PM 3 to the state two emails and 11 photographs relating  
02 35 26PM 4 to this issue.

02 35 28PM 5 And then on March 30, we disclosed a  
02 35 31PM 6 rough draft of Detective Diskin's supplemental  
02 35 35PM 7 report documenting his discussion with the  
02 35 39PM 8 Hamiltons on March 21st of 2011. And the Court  
02 35 41PM 9 granted that motion.

02 35 43PM 10 Ultimately the defendant requested an  
02 35 46PM 11 interview with both of the Hamiltons, which was  
02 35 47PM 12 arranged by the state. And following the interview  
02 35 50PM 13 the defendant requested a copy of the notebook that  
02 35 52PM 14 Mr. Hamilton had referred to and brought to that  
02 35 56PM 15 interview. And copies of the notebook were  
02 35 59PM 16 provided to the defense.

02 36 01PM 17 Later they requested digital copies of  
02 36 04PM 18 those photographs taken by the Hamiltons in October  
02 36 06PM 19 of 2006, and then they moved to admit those  
02 36 10PM 20 photographs at trial as defense exhibits 882 and  
02 36 14PM 21 883. And then during the testimony of the  
02 36 17PM 22 Hamiltons the defendant used the exhibits to  
02 36 19PM 23 impeach the credibility of the Hamiltons.

02 36 22PM 24 But the defendant's argument that the  
02 36 23PM 25 state improperly disclosed information about the  
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02 36 26PM 1 Hamiltons' policy on toxins ignores the plain  
02 36 32PM 2 language of 15.6 and ignores this court's ruling  
02 36 37PM 3 after we filed a 15.6 motion wherein the Court  
02 36 40PM 4 granted us leave to use that information that we  
02 36 43PM 5 had learned.

02 36 44PM 6 So there is simply no basis for the  
02 36 46PM 7 defendant's motion wherein they claim that we  
02 36 48PM 8 committed prosecutorial misconduct. And, in fact,  
02 36 52PM 9 there is simply no basis to argue any error at all  
02 36 56PM 10 with regard to the Hamiltons.

02 37 08PM 11 MR. KELLY: Your Honor, can we take a break?  
02 37 10PM 12 It's been about an hour and a half.

02 37 12PM 13 THE COURT: It's pretty close. So we'll do  
02 37 14PM 14 that. We'll take the recess right now. About 15  
02 37 14PM 15 minutes. Thank you.

02 37 14PM 16 (Recess.)

03 00 14PM 17 THE COURT: The record will show the presence  
03 00 14PM 18 of Mr. Ray and the attorneys.

03 00 16PM 19 Ms. Polk.

03 00 17PM 20 MS. POLK: Again, Your Honor, I do apologize  
03 00 18PM 21 for the length of the argument. And I do  
03 00 23PM 22 appreciate the Court's patience in allowing me to  
03 00 27PM 23 make a record with respect to each one of these 31  
03 00 28PM 24 alleged incidents.

03 00 28PM 25 Before I continue on that last topic I  
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03 00 32PM 1 had -- with respect to the paramedic report from  
03 00 35PM 2 2005 pertaining to Daniel Pfankuch, I had said it  
03 00 40PM 3 was Trial Exhibit 257. That was not admitted, but  
03 00 44PM 4 Exhibit 12 at the 404(b) hearing was admitted on  
03 00 49PM 5 November 16 of 2010. And that is the paramedic  
03 00 51PM 6 report.

03 01 03PM 7 The second example that is given  
03 01 06PM 8 beginning on page 11 of the defendant's motion  
03 01 08PM 9 claiming that the state had failed to timely  
03 01 11PM 10 disclose information -- the first example was the  
03 01 15PM 11 Hamilton information, which the Court did allow  
03 01 17PM 12 according to the rules.

03 01 19PM 13 And then the second example given in the  
03 01 21PM 14 defendant's motion is that our request of this  
03 01 25PM 15 court to allow us to call Dr. David Kent  
03 01 28PM 16 constitutes prosecutorial misconduct.

03 01 32PM 17 As the Court knows, Dr. Kent had  
03 01 38PM 18 contacted the state via email on a weekend after  
03 01 41PM 19 the trial was well in progress. We immediately  
03 01 44PM 20 disclosed that email, his email to the state, on  
03 01 47PM 21 the Monday preceding the weekend. That was  
03 01 50PM 22 March 14 that we disclosed it. And we added  
03 01 54PM 23 Dr. Kent to our witness list.

03 01 56PM 24 Ultimately the Court precluded the state  
03 01 58PM 25 from calling Dr. Kent as a witness, ruling that the  
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03 02 03PM 1 admission of the evidence would be prejudicial to  
03 02 05PM 2 the defendant and not consistent with the  
03 02 07PM 3 defendant's rights to and the public's interest in  
03 02 09PM 4 a fair and orderly trial.

03 02 11PM 5 Because the Court did not allow the state  
03 02 14PM 6 to call Dr. Kent as a witness and there was  
03 02 16PM 7 absolutely no mention of his proposed testimony  
03 02 20PM 8 ever to the jury, there simply can be no finding  
03 02 24PM 9 that the state's conduct in this regard influenced  
03 02 28PM 10 the verdicts in this case.

03 02 29PM 11 There is no support whatsoever for the  
03 02 32PM 12 argument advanced by the defense that it was error,  
03 02 36PM 13 let alone prosecutorial misconduct, for us to  
03 02 40PM 14 follow up on investigative leads. We followed the  
03 02 44PM 15 rules in doing so. And whatever rulings we got  
03 02 46PM 16 from the Court we then completely complied with.

03 02 51PM 17 On page 13 of the defendant's motion, the  
03 02 55PM 18 argument is advanced as grounds for a new trial  
03 03 00PM 19 that, quote, the state throughout the trial has  
03 03 02PM 20 taken positions that it knows to be legally  
03 03 05PM 21 meritless. And that's on page 13, lines 17 to 18.

03 03 13PM 22 The motion cites two instances in support  
03 03 16PM 23 of that allegation of error. The first is that the  
03 03 20PM 24 state argued an independent legal duty for  
03 03 24PM 25 omission. And the second is that the state argued  
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03 03 28PM 1 that civil lawsuits are an admission of  
03 03 28PM 2 responsibility.

03 03 31PM 3 The state's view that it did not need to  
03 03 31PM 4 identify an independent legal duty in order to  
03 03 31PM 5 prosecute the defendant for omissions was an issue  
03 03 43PM 6 that was briefed extensively, argued extensively,  
03 03 46PM 7 by the parties during the trial as well as the jury  
03 03 51PM 8 instructions.

03 03 51PM 9 This issue in the defendant's motion,  
03 03 55PM 10 there is absolutely no legal support raised for the  
03 03 58PM 11 argument that somehow it was misconduct for the  
03 04 00PM 12 state to advance a legal argument. And there is no  
03 04 03PM 13 plausible basis for this court to find error let  
03 04 06PM 14 alone prosecutorial misconduct.

03 04 08PM 15 The state's position that settlement of a  
03 04 13PM 16 civil lawsuit is admission of liability -- that  
03 04 15PM 17 came up in the context of Rule 408 of the rules of  
03 04 18PM 18 evidence and during the discussion about the issue  
03 04 20PM 19 of the use of civil lawsuits for impeachment  
03 04 24PM 20 purposes.

03 04 25PM 21 Again, the defendant's motion cites no  
03 04 26PM 22 case law, no legal authority, for his position that  
03 04 31PM 23 these two issues somehow constitute prosecutorial  
03 04 35PM 24 misconduct of any sort, or perhaps more important,  
03 04 39PM 25 that these arguments advanced by the state somehow

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03 04 42PM 1 affected the outcome of the trial itself and denied  
03 04 45PM 2 the defendant a fair trial.

03 04 48PM 3 Again, these, as with all of the other  
03 04 52PM 4 issues I've talked about, there is simply no basis  
03 04 55PM 5 for the defense to argue that there is error let  
03 05 01PM 6 alone prosecutorial misconduct.

03 05 01PM 7 On page 14 of defendant's motion, the  
03 05 07PM 8 motion argued that there is a pattern of improper  
03 05 09PM 9 questioning of witnesses by the state. On page 14  
03 05 16PM 10 it's argued that the potentially inculpatory  
03 05 22PM 11 aspects of the Haddow report were improperly argued  
03 05 25PM 12 by the state.

03 05 28PM 13 Again, there is no legal support cited in  
03 05 32PM 14 the defense's motion that the state's line of  
03 05 35PM 15 questioning on this issue was in any way improper.

03 05 38PM 16 As the Court will remember, on May 14 --  
03 05 42PM 17 on May 4 of 2011 during my redirect exam of  
03 05 48PM 18 Detective Diskin, I asked him about information  
03 05 50PM 19 about carbon dioxide and whether it was consistent  
03 05 54PM 20 with the information he had learned from Rick  
03 05 58PM 21 Haddow.

03 06 01PM 22 The defense's motion for a new trial  
03 06 01PM 23 portrays that issue on page 14 to 16 of the motion  
03 06 05PM 24 in a way that is misleading and omits important  
03 06 08PM 25 facts setting the stage for my line of questions.

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03 06 13PM 1 My questions that are set forth in  
03 06 15PM 2 defendant's motion for mistrial follow leading  
03 06 19PM 3 questions by Mr. Kelly during his cross-examination  
03 06 21PM 4 of Detective Diskin. And what's admitted from the  
03 06 24PM 5 defendant's motion for new trial are the line of  
03 06 27PM 6 questions from Mr. Kelly on cross-examination of  
03 06 30PM 7 Detective Diskin where he asked multiple questions  
03 06 34PM 8 about Mr. Haddow's report and improperly suggested  
03 06 38PM 9 to the jury that the state was hiding information.

03 06 42PM 10 And specifically I would refer the Court  
03 06 47PM 11 to the trial transcript of May 4 of 2011, pages 15  
03 06 52PM 12 to 40, where we argued this issue at length outside  
03 06 58PM 13 the presence of the jury, and the Court ultimately  
03 07 01PM 14 issued a ruling.

03 07 03PM 15 But I'll refresh the Court's recollection  
03 07 06PM 16 that Mr. Kelly in cross-examination of  
03 07 10PM 17 Detective Diskin had talked about the Haddow email,  
03 07 15PM 18 had called it a "preliminary report," had examined  
03 07 18PM 19 Detective Diskin about the June conference call  
03 07 21PM 20 between the county attorney prosecutors and  
03 07 28PM 21 Mr. Haddow, that he had asked several questions  
03 07 29PM 22 about the June conference call, that he talked  
03 07 30PM 23 about whether or not the state had disclosed Rick  
03 07 34PM 24 Haddow as a witness.

03 07 34PM 25 He cross-examined Detective Diskin about  
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03 07 36PM 1 whether or not Ms. Do had asked to interview  
03 07 40PM 2 Mr. Haddow. He talked about what the jury had been  
03 07 43PM 3 told at the beginning of trial as to who the  
03 07 45PM 4 witnesses would be, how 29 days -- several  
03 07 50PM 5 questions about 29 days ago a report being  
03 07 52PM 6 disclosed by the county attorney after the trial  
03 07 55PM 7 had started. And then he talked about a Brady  
03 07 58PM 8 violation and about sanctions.

03 08 00PM 9 Those questions came with the state  
03 08 03PM 10 objecting over my objections. And I believe  
03 08 10PM 11 without question that information -- many of those  
03 08 14PM 12 questions elicited information that was improper  
03 08 16PM 13 for the jury to hear, including that the Court had  
03 08 19PM 14 found a Brady violation and sanctioned the state.

03 08 23PM 15 The record in this case will show that  
03 08 26PM 16 prior to my questioning -- my questions to  
03 08 30PM 17 Detective Diskin that the defense claims are a  
03 08 33PM 18 basis for a new trial -- the record will show that  
03 08 36PM 19 Mr. Kelly had posed question to Detective Diskin  
03 08 40PM 20 stating to the effect that -- to Detective Diskin  
03 08 43PM 21 that you had never told Ms. Do in your interview  
03 08 48PM 22 that occurred June 2010 about carbon dioxide, did  
03 08 48PM 23 you?

03 08 51PM 24 And the detective had responded, yes, I  
03 08 51PM 25 did.

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03 08 54PM 1 And Mr. Kelly said, well, we can look at  
 03 08 56PM 2 a transcript, can't we?  
 03 08 58PM 3 And then Mr. Kelly never went back to the  
 03 09 00PM 4 transcript.  
 03 09 02PM 5 So on redirect, then, I was following up  
 03 09 05PM 6 on that particular issue. And my question was  
 03 09 10PM 7 proper to clarify that Detective Diskin had, in  
 03 09 12PM 8 fact, told Ms. Do about the issue of carbon  
 03 09 16PM 9 dioxide.  
 03 09 17PM 10 My question to Detective Diskin was, do  
 03 09 21PM 11 you recall what you told Ms. Do during the  
 03 09 24PM 12 interview of June 16, 2010, about carbon dioxide?  
 03 09 27PM 13 He responded, yes.  
 03 09 29PM 14 My question was, and what did you tell  
 03 09 31PM 15 her?  
 03 09 31PM 16 And he said, that I believe that the  
 03 09 33PM 17 deaths were a result of a combination of heat and  
 03 09 36PM 18 carbon dioxide.  
 03 09 37PM 19 And then my question was, is that  
 03 09 38PM 20 consistent with the information that you learned  
 03 09 40PM 21 from the man named Rick Haddow?  
 03 09 42PM 22 And his answer was, yes.  
 03 09 44PM 23 And that is set forth in the trial  
 03 09 46PM 24 transcript, May 4, 2011, at page 187, lines 16 to  
 03 09 53PM 25 25.

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03 09 54PM 1 The next morning, on May 5 of 2011, the  
 03 09 56PM 2 defense moved for a mistrial on this very issue.  
 03 10 02PM 3 And I made the same record then that I am making  
 03 10 06PM 4 here today. And this court denied the motion for  
 03 10 09PM 5 mistrial. And that's set forth on the -- in the  
 03 10 14PM 6 trial transcript on May 5 of 2011 at page 7,  
 03 10 21PM 7 lines 6 through 21, where the Court denied the  
 03 10 24PM 8 motion for mistrial.  
 03 10 28PM 9 And I would note again, Your Honor, this  
 03 10 30PM 10 issue, like many of the other issues argued as  
 03 10 38PM 11 errors or prosecutorial misconduct, there is simply  
 03 10 38PM 12 no legal authority or case law set forth in the  
 03 10 43PM 13 defendant's motion to support the notion that  
 03 10 45PM 14 somehow that there was any inappropriate conduct  
 03 10 48PM 15 there.  
 03 10 52PM 16 Ultimately, then, this court on May 9,  
 03 10 56PM 17 2011, issued a ruling, what was called "a ruling on  
 03 10 58PM 18 pending matters" and clarified how the parties  
 03 11 02PM 19 could use the Haddow email throughout the remainder  
 03 11 05PM 20 of the trial.  
 03 11 08PM 21 In that ruling this court stated that the  
 03 11 12PM 22 Brady violation, quote, did not allow the defendant  
 03 11 16PM 23 to present information in the Haddow report in a  
 03 11 19PM 24 manner contrary to the rules of evidence. The  
 03 11 19PM 25 Court's ruling also noted that, quote, issues

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03 11 21PM 1 concerning the potential significance of carbon  
 03 11 25PM 2 dioxide and of the location of the participants in  
 03 11 27PM 3 the sweat lodge have been known to the parties for  
 03 11 31PM 4 months prior to the commencement of trial. And  
 03 11 33PM 5 that's the Court's ruling on pending matters on  
 03 11 37PM 6 April 9, 2011, on page 2.  
 03 11 41PM 7 And then, finally, I want to draw the  
 03 11 44PM 8 Court's attention and make a record of the fact  
 03 11 46PM 9 that the excerpts from the transcript that are  
 03 11 49PM 10 cited in the defendant's motion for new trial about  
 03 11 53PM 11 the Court's comments were not in response to my  
 03 11 56PM 12 line of questioning of Detective Diskin but were in  
 03 11 58PM 13 response to some issues surrounding the testimony  
 03 12 03PM 14 of Dr. Mosley. And that's on page 15 of the  
 03 12 05PM 15 defendant's motion, lines 13 to 23.  
 03 12 10PM 16 The motion quotes this court's comments  
 03 12 14PM 17 made on May 5, 2011, and saying that they are in  
 03 12 19PM 18 response to my line of questioning of  
 03 12 20PM 19 Detective Diskin. And that is simply inaccurate.  
 03 12 24PM 20 A review of that passage reveals that  
 03 12 28PM 21 those comments by this court actually came during a  
 03 12 33PM 22 discussion between the parties and the Court about  
 03 12 36PM 23 an issue that had occurred during the direct  
 03 12 38PM 24 examination of Dr. Mosley relating to his  
 03 12 42PM 25 differential diagnose and that those comments from

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03 12 45PM 1 defendant's motion should be read in the  
 03 12 48PM 2 appropriate context.  
 03 12 50PM 3 Dr. Mosley had testified on the morning  
 03 12 52PM 4 of May 5 of 2011. And then that afternoon defense  
 03 12 57PM 5 had made another motion for mistrial after the  
 03 12 58PM 6 state had questioned Dr. Mosley about carbon  
 03 13 03PM 7 dioxide.  
 03 13 03PM 8 And the Court's comments that are set  
 03 13 05PM 9 forth on page 15 of defendant's motion to argue  
 03 13 10PM 10 that my line of questions of Detective Diskin were  
 03 13 12PM 11 improper actually pertain to Dr. Mosley's testimony  
 03 13 17PM 12 and not Detective Diskin's.  
 03 13 20PM 13 On page 26 of our response, Your Honor,  
 03 13 23PM 14 we quoted the entire passage for the Court in its  
 03 13 28PM 15 correct context. I won't quote it again here. But  
 03 13 33PM 16 just to emphasize that the comments that appear in  
 03 13 35PM 17 defendant's motion are taken out of context and  
 03 13 38PM 18 should be read within the appropriate context.  
 03 13 42PM 19 And, finally, this issue -- again, this  
 03 13 44PM 20 goes back to the Haddow issue. I've already made  
 03 13 47PM 21 this argument once today, and I will make it again,  
 03 13 50PM 22 that as the trial progressed, the parties and the  
 03 13 54PM 23 Court learned more about the issue of carbon  
 03 13 57PM 24 dioxide. And I think the Court in reviewing  
 03 13 58PM 25 whether or not there was error and whether or not

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03 14 01PM 1 the error was harmless or somehow prejudiced the  
 03 14 05PM 2 defendant should review it in the context of what  
 03 14 08PM 3 the Court and the parties know now. And that's  
 03 14 10PM 4 specifically the context of Dr. Paul's testimony --  
 03 14 12PM 5 the defendant's own expert -- who testified that,  
 03 14 14PM 6 in his opinion, carbon dioxide would dissipate  
 03 14 20PM 7 equally throughout the sweat lodge.

03 14 33PM 8 On page 16 of defendant's motion --  
 03 14 35PM 9 moving on to the next incident that the defense  
 03 14 37PM 10 alleges was misconduct, on page 16, lines 6 through  
 03 14 43PM 11 7, it's written that the county attorney asked a  
 03 14 48PM 12 litany of questions suggesting that the defense had  
 03 14 52PM 13 somehow acted improperly in not alerting the state  
 03 14 55PM 14 to the possibility of poisoning or otherwise  
 03 14 58PM 15 advising the state of the weaknesses in its case  
 03 15 01PM 16 against Mr. Ray. And that's simply untrue,  
 03 15 04PM 17 Your Honor.

03 15 06PM 18 First, my line of questioning of  
 03 15 08PM 19 Detective Diskin was to establish when he learned  
 03 15 11PM 20 of the organophosphate issue and whether any of the  
 03 15 14PM 21 government witnesses, including Diskin himself, had  
 03 15 18PM 22 ever been questioned by the defense about  
 03 15 20PM 23 organophosphates during the pretrial interviews.

03 15 23PM 24 My line of questioning of  
 03 15 25PM 25 Detective Diskin was not to suggest in any way that  
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03 15 30PM 1 the defendant or defense had acted improperly. And  
 03 15 33PM 2 it was certainly not to suggest that the defense  
 03 15 36PM 3 had any obligation to advise the state of the  
 03 15 39PM 4 weaknesses of our case, as is written in the  
 03 15 42PM 5 motion.

03 15 43PM 6 Furthermore, my line of questioning was  
 03 15 45PM 7 not burden shifting in any way. And the defense  
 03 15 48PM 8 offers no legal support on this issue for their  
 03 15 52PM 9 position that it was burden shifting.

03 15 54PM 10 As the Court will recall, one of the  
 03 15 57PM 11 defenses in this case was to attack the quality of  
 03 16 00PM 12 the state's investigation and specifically to  
 03 16 03PM 13 attack the fact that the state did not know or  
 03 16 07PM 14 pursue the issue of organophosphates poisoning.

03 16 10PM 15 The state never hid from this court or  
 03 16 14PM 16 the jury that the fact that we did not know of the  
 03 16 17PM 17 organophosphate reference until Mr. Li's opening.  
 03 16 21PM 18 And the state was also up front with the jury that  
 03 16 24PM 19 when we learned of it, the detective did what he  
 03 16 27PM 20 could to follow up on it.

03 16 29PM 21 And given that attack on the quality of  
 03 16 35PM 22 the detective's investigation, there was absolutely  
 03 16 39PM 23 nothing improper about a line of questions to  
 03 16 41PM 24 establish how and when the detective finally  
 03 16 41PM 25 learned of the organophosphate issue.

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03 16 43PM 1 And, in fact, when the defendant at that  
 03 16 47PM 2 time asked for a contemporaneous instruction on  
 03 16 51PM 3 this issue, the Court found that the state had a  
 03 16 54PM 4 proper purpose for that questioning. And I would  
 03 16 58PM 5 point the Court to the trial transcript of  
 03 16 59PM 6 4/28/2011, at page 107, lines 3 to 4, where the  
 03 17 07PM 7 Court stated, in terms of explaining the  
 03 17 08PM 8 investigation, that's fine.

03 17 11PM 9 And, finally, given the fact that this  
 03 17 14PM 10 court did give a lengthy, contemporaneous  
 03 17 19PM 11 instruction to the jury on the issue of burden  
 03 17 23PM 12 shifting to alleviate concerns that the questions  
 03 17 23PM 13 might imply the defense had some obligation to  
 03 17 25PM 14 inform the state of its finding, this line of  
 03 17 28PM 15 questioning was clearly harmless.

03 17 32PM 16 I won't quote the instruction that the  
 03 17 35PM 17 Court gave the jury at that time, but it was given.  
 03 17 40PM 18 And it's attached at Exhibit J to our response.

03 17 46PM 19 I would draw the Court's attention to  
 03 17 48PM 20 State versus -- state ex rel McDougall versus  
 03 17 54PM 21 Corcoran that is cited in our response. And it's  
 03 17 56PM 22 found at 153 Ariz. 157, where the Court stated that  
 03 18 03PM 23 the cautionary instruction to the jury was more  
 03 18 06PM 24 than sufficient to cure any harm that might have  
 03 18 09PM 25 resulted. And that pertained to an issue in the  
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03 18 15PM 1 White case.

03 18 16PM 2 Again, Your Honor, the cases -- the clear  
 03 18 19PM 3 line of authority is clear that when cautionary  
 03 18 24PM 4 instructions are given -- in fact, my review of the  
 03 18 27PM 5 cases, it appears that they are encouraged, that  
 03 18 31PM 6 giving those cautionary instructions cures any  
 03 18 35PM 7 potential error at the time.

03 18 37PM 8 The state's not conceding there was any  
 03 18 39PM 9 error. The defense motion provides no legal  
 03 18 43PM 10 support that that line of questioning was, in fact,  
 03 18 47PM 11 burden shifting when it was not. The burden  
 03 18 50PM 12 shifting cases normally focus on comments on the  
 03 18 53PM 13 defendant's refusal or decision not to testify.  
 03 18 56PM 14 These questions were not burden shifting.

03 18 58PM 15 But in any event, upon the defendant's  
 03 19 00PM 16 request, this court did give that contemporaneous,  
 03 19 04PM 17 cautionary jury instructions reminding the jury  
 03 19 07PM 18 that the state has the burden of proof. And so  
 03 19 09PM 19 clearly there is no error there.

03 19 17PM 20 Now, Your Honor, in the defense's motion  
 03 19 20PM 21 for new trial based on prosecutorial misconduct  
 03 19 24PM 22 alleging that the state had engaged in improper  
 03 19 27PM 23 questions, that's the only example that is given.  
 03 19 37PM 24 But I would just note the following: That on  
 03 19 40PM 25 April 11, we filed the state's response to the

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03 19 48PM 1 defendant's bench memorandum on prosecutorial  
03 19 48PM 2 misconduct, and we briefed and made a record on the  
03 19 50PM 3 issues that were raised then. And to the extent  
03 19 50PM 4 necessary, I'd like to incorporate those responses  
03 19 50PM 5 in case there is issues that I failed to cover in  
03 19 59PM 6 our response or here today in court.

03 20 01PM 7 And then I'd like to draw the Court's  
03 20 04PM 8 attention to the fact that a review of the record  
03 20 06PM 9 in this case shows that the state consistently  
03 20 10PM 10 worked to present a factual, truthful and complete  
03 20 14PM 11 representation of the circumstances of this case to  
03 20 17PM 12 the jury and to comply with the rulings of the  
03 20 19PM 13 Court.

03 20 20PM 14 On multiple occasions we requested the  
03 20 23PM 15 Court's guidance before questioning witnesses  
03 20 26PM 16 regarding, for example, the prior sweat lodge  
03 20 31PM 17 ceremony and other litigated matters. And examples  
03 20 34PM 18 of our caution are set out on pages 23 to 24 of our  
03 20 38PM 19 response to the motion for a new trial.

03 20 40PM 20 And specifically, when both Scott Barratt  
03 20 43PM 21 was testifying as well as Amayra Hamilton, the  
03 20 46PM 22 prosecutors outside the presence of the jury asked  
03 20 49PM 23 for the Court's guidance, told Court and counsel  
03 20 52PM 24 what the questions were we proposed to ask and then  
03 20 56PM 25 abided by any rulings the Court made at that time.

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03 20 59PM 1 There is no record and there is no  
03 21 01PM 2 support whatsoever for the allegation in the motion  
03 21 05PM 3 for new trial that the state intentionally engaged  
03 21 08PM 4 in improper lines of questions.

03 21 12PM 5 On page 16 of the defendant's motion, the  
03 21 16PM 6 defendant -- the motion writes the following:  
03 21 21PM 7 Quote, the state behaved recklessly with respect to  
03 21 25PM 8 the potential perjury by witness Mark Rock, end  
03 21 30PM 9 quote.

03 21 30PM 10 And on that -- in that section of  
03 21 32PM 11 defendant's motion for new trial, they alleged that  
03 21 35PM 12 by providing witness Mark Rock with use immunity  
03 21 38PM 13 for his testimony that the state either knowingly  
03 21 41PM 14 elicited false testimony or, quote, at least  
03 21 46PM 15 displayed reckless indifference to the risk of  
03 21 50PM 16 doing so, end of quote.

03 21 51PM 17 This is simply an unfounded accusation,  
03 21 54PM 18 Your Honor. And I believe that there is a complete  
03 21 58PM 19 record of this issue. There is absolutely no  
03 21 59PM 20 factual or legal support for the allegation in  
03 22 05PM 21 defendant's motion that there was error or any sort  
03 22 09PM 22 of misconduct by the state in this regard.

03 22 09PM 23 As the Court knows, Mark Rock was given  
03 22 12PM 24 use immunity for his testimony pursuant to  
03 22 15PM 25 Title 13, Section 4064. The statute in the order

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03 22 20PM 1 signed by the Court specifically advises a witness  
03 22 22PM 2 that he may be prosecuted or subject to penalty or  
03 22 27PM 3 forfeiture for any perjury, false swearing or  
03 22 31PM 4 contempt committed in answering or failing to  
03 22 34PM 5 answer or in producing or failing to produce  
03 22 37PM 6 evidence in accordance with the order. And that at  
03 22 40PM 7 the hearing on June 1st, 2011, in front of this  
03 22 42PM 8 court, the state advised the Court that we had not  
03 22 49PM 9 offered nor would we ever offer immunity from  
03 22 53PM 10 perjury from a witness on the stand. And that's  
03 22 54PM 11 set forth on the trial transcript on June 1st  
03 22 58PM 12 of 2011 on page 7, lines 3 to 8.

03 23 02PM 13 Moreover, Attorney Mr. Lauenders, who had  
03 23 06PM 14 counseled Mr. Rock regarding his testimony, advised  
03 23 08PM 15 the Court that the documents he wanted to file with  
03 23 12PM 16 the Court, quote, did not relate to those types of  
03 23 14PM 17 concerns, meaning perjury or false testimony, and  
03 23 17PM 18 that a concern that there is an impending perjury,  
03 23 20PM 19 a crime of some sort. That's set forth again on  
03 23 24PM 20 that same day, June 1st at page 23 in the trial  
03 23 28PM 21 transcript.

03 23 29PM 22 What the record shows is that Mr. Rock  
03 23 31PM 23 was less than candid with the investigators when  
03 23 35PM 24 they interviewed him on October 8, 2009, and that  
03 23 38PM 25 he later came forward with additional information

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03 23 40PM 1 that was properly disclosed to the defense prior to  
03 23 42PM 2 trial.

03 23 46PM 3 The Court will recall that Mr. Rock  
03 23 48PM 4 testified at the 404B hearing as well as the trial.  
03 23 51PM 5 And, again, this is another incident that the  
03 23 54PM 6 defense motion for new trial alleges is misconduct  
03 23 58PM 7 or error but cites no legal authority for that  
03 24 01PM 8 argument. Nor is there any argument that the state  
03 24 04PM 9 acted improperly in proceeding with the testimony  
03 24 07PM 10 of Mr. Rock.

03 24 08PM 11 We cited for the Court in our response  
03 24 12PM 12 United States versus Sherlock, which is a Ninth  
03 24 16PM 13 Circuit case from 1989 at 962 F. 2d 1349, that  
03 24 23PM 14 provides that mere inconsistency in testimony by a  
03 24 27PM 15 governmental witness does not establish knowing use  
03 24 31PM 16 of false testimony.

03 24 32PM 17 And furthermore, I would remind the Court  
03 24 34PM 18 that the rules of evidence contemplates that  
03 24 37PM 19 differences will exist between trial testimony and  
03 24 39PM 20 prior statements of a witness. And Arizona Rules  
03 24 43PM 21 of Evidence, Rule 801(d)(1), contemplates that  
03 24 47PM 22 inconsistent statements will be admitted and  
03 24 50PM 23 provided to the jury for their assessment of the  
03 24 53PM 24 issue.

03 24 53PM 25 As this court knows, during trial the  
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03 24 56PM 1 defense repeatedly used transcripts and records of  
03 25 00PM 2 participant's statements, the law enforcement from  
03 25 04PM 3 October 2009, to impeach trial testimony, including  
03 25 05PM 4 the testimony of Mr. Rock.

03 25 05PM 5 And in the closing argument by Mr. Li,  
03 25 12PM 6 the use immunity agreement to impeach his testimony  
03 25 17PM 7 was argued to the jury. The state neither elicited  
03 25 21PM 8 false testimony nor displayed, quote, reckless  
03 25 25PM 9 indifference to the risk of doing so.

03 25 25PM 10 There is absolutely no misconduct nor any  
03 25 27PM 11 argument that can be advanced that the state  
03 25 29PM 12 committed error, let alone prosecutorial  
03 25 32PM 13 misconduct, in calling Mr. Rock as a witness.

03 25 37PM 14 On page 18 of defendant's motion for new  
03 25 40PM 15 trial, there are several incidents pertaining to  
03 25 44PM 16 the closing argument both during the guilt phase as  
03 25 47PM 17 well as the aggravation phase of the trial that the  
03 25 52PM 18 motion asserts are errors and prosecutorial  
03 25 56PM 19 misconduct and grounds for a new trial.

03 25 59PM 20 During the state's closing argument, the  
03 26 04PM 21 defense made many of the same objections on these  
03 26 06PM 22 issues that they have raised in the motion for new  
03 26 10PM 23 trial. The objections were properly addressed by  
03 26 14PM 24 the Court.

03 26 14PM 25 In a few instances the Court found that  
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03 26 17PM 1 an instruction to the jury was appropriate, and you  
03 26 19PM 2 promptly provided that instruction to the jury,  
03 26 22PM 3 including the repeated reminder to the jury that  
03 26 25PM 4 lawyers' comments are not evidence.

03 26 28PM 5 I'm going to address each of the claims  
03 26 30PM 6 that the defendant raises below. But in doing so,  
03 26 36PM 7 I want to just discuss briefly some of the relevant  
03 26 38PM 8 cases that talk specifically about closing  
03 26 41PM 9 arguments by the parties.

03 26 42PM 10 I want to draw the Court's attention to  
03 26 44PM 11 State versus Amaya-Ruiz. We cited it in our  
03 26 50PM 12 response. It's an Arizona Supreme Court case from  
03 26 52PM 13 1990. The cite is 166 Ariz. 152. And that case  
03 26 55PM 14 recognizes the well-accepted principal that counsel  
03 27 02PM 15 are afforded wide latitude and may comment on the  
03 27 07PM 16 evidence and any reasonable inference to be drawn  
03 27 10PM 17 from the evidence.

03 27 11PM 18 In that case the Court said, quote, it's  
03 27 14PM 19 okay to attack a defendant's arguments rather than  
03 27 17PM 20 attacking counsel and found permissible the  
03 27 22PM 21 following examples of comments during closing: And  
03 27 31PM 22 in Amaya-Ruiz the prosecutor attacks the defense's  
03 27 34PM 23 theory of the case saying that the defense  
03 27 38PM 24 attorneys had blind sided witnesses; that the  
03 27 38PM 25 defense had relied on, quote, innuendo and

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03 27 41PM 1 inference, quote, to support their theory of the  
03 27 44PM 2 case; that the defense attorney had made  
03 27 47PM 3 accusations against witnesses who were unable to  
03 27 50PM 4 respond.

03 27 52PM 5 The prosecutor in closing characterized  
03 27 55PM 6 the defense as a smoke screen and stated that the  
03 27 58PM 7 defense theory was outrageous, quote, that it  
03 28 02PM 8 was quite an outrageous argument for her to make,  
03 28 05PM 9 that she, the defense attorney, may not be outraged  
03 28 09PM 10 by this prospect. But I certainly am.

03 28 12PM 11 All of those, Your Honor, I bring the  
03 28 14PM 12 Court's attention because the Court in Amaya-Ruiz  
03 28 17PM 13 said all of that is permissible argument that  
03 28 22PM 14 prosecutors can make in making closing argument to  
03 28 25PM 15 the jury.

03 28 27PM 16 And I would also bring to the Court's  
03 28 30PM 17 attention State versus Hansen, cited in our  
03 28 32PM 18 response as well. It's an Arizona Supreme Court  
03 28 35PM 19 case from 1988, found at 156 Ariz. 291, wherein the  
03 28 42PM 20 Court quoted State versus Gonzales, which was an  
03 28 46PM 21 earlier Arizona case.

03 28 48PM 22 Again, Your Honor, there are quite a few  
03 28 49PM 23 cases dealing with closing arguments and the wide  
03 28 53PM 24 latitude that prosecutors are given. But I'd like  
03 28 56PM 25 to bring this quote to the Court's attention from

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03 28 58PM 1 the Hansen case. And this is on pages 296 to 297,  
03 29 02PM 2 where the Court said, quote, excessive and  
03 29 06PM 3 emotional language is the bread and butter weapon  
03 29 09PM 4 of counsel's arsenal limited by the principal that  
03 29 13PM 5 attorneys are not permitted to introduce or comment  
03 29 16PM 6 upon evidence which has not previously been offered  
03 29 19PM 7 and placed before the jury.

03 29 22PM 8 I know that the Court is familiar with  
03 29 24PM 9 the State versus Bible case, which is a 1993 case,  
03 29 28PM 10 which, incidentally, predates the State versus  
03 29 31PM 11 Hughes case, which sets out the standard for the  
03 29 33PM 12 motion for new trial based on prosecutorial  
03 29 37PM 13 misconduct.

03 29 37PM 14 But in the Bible case the Arizona Supreme  
03 29 42PM 15 Court case again recognized the wide latitude that  
03 29 46PM 16 prosecutors have in presenting their closing  
03 29 48PM 17 arguments to the jury. Quote, during closing  
03 29 50PM 18 arguments counsel may summarize the evidence, make  
03 29 55PM 19 submittals to the jury, urge the jury to draw  
03 29 58PM 20 reasonable inferences from the evidence and suggest  
03 30 01PM 21 ultimate conclusions.

03 30 03PM 22 And in the Bible case one of the  
03 30 05PM 23 statements made -- or several of the statements  
03 30 08PM 24 made in closing that the defense drew upon as a  
03 30 13PM 25 basis for a motion for a new trial included the

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03:30:17PM 1 statement in the opening by the prosecutor that the  
03:30:20PM 2 victim may have been tortured. The Court found  
03:30:23PM 3 that it was improper but found it was not grounds  
03:30:26PM 4 for a new trial.

03:30:29PM 5 The prosecutor had made the statement in  
03:30:30PM 6 closing that the victim may have been tortured.

03:30:34PM 7 There the Court found that it was a proper comment  
03:30:37PM 8 because it could be inferred from the evidence.

03:30:38PM 9 The Court found as improper the  
03:30:43PM 10 prosecutor's comments in closing where the  
03:30:47PM 11 prosecutor asked the jury to protect the victim's  
03:30:50PM 12 rights. They found that that was improper. They  
03:30:54PM 13 found it was improper when the prosecutor invited  
03:30:55PM 14 the jury to decide the case on emotion and ignore  
03:30:58PM 15 the Court's instruction.

03:31:00PM 16 But the Court found that although  
03:31:04PM 17 improper that they were harmless and specifically  
03:31:04PM 18 pointed to the Court's instructions, both the  
03:31:09PM 19 preliminary and the final instructions, and the  
03:31:13PM 20 role that the instructions play in focusing the  
03:31:15PM 21 relevant inquiry of the jury on the evidence that  
03:31:18PM 22 is admissible along with the strength of the  
03:31:22PM 23 evidence in the Bible case.

03:31:25PM 24 And in the Bible case, in spite of  
03:31:27PM 25 finding improper comments by the prosecutor in  
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03:31:30PM 1 closing, the Court said that it was not so  
03:31:32PM 2 prejudicial that it warranted a new trial.

03:31:37PM 3 I also want to draw the Court's attention  
03:31:39PM 4 to the conduct in the State versus Newell case,  
03:31:42PM 5 which is another Arizona case from 2006, where the  
03:31:48PM 6 Court reiterated that misconduct that warrants a  
03:31:53PM 7 mistrial only exists where the prosecutor's  
03:31:57PM 8 statements call to the jury's attention matters it  
03:32:01PM 9 should not have considered in reaching its decision  
03:32:03PM 10 and the Court finds the probability that the jurors  
03:32:06PM 11 were, in fact, influenced by those remarks. And,  
03:32:08PM 12 again, those are comments during argument.

03:32:11PM 13 The comments in the Newell case, which  
03:32:14PM 14 the cite for Newell -- it's in our response. But  
03:32:17PM 15 it's found at 212 Ariz. 389. The prosecutor in his  
03:32:23PM 16 closing had told the jury that they had 3,000 pages  
03:32:27PM 17 of police reports but that not every witness was  
03:32:31PM 18 being called. They found nothing improper about  
03:32:34PM 19 that comment.

03:32:38PM 20 They did find it improper when the  
03:32:38PM 21 prosecutor commented about the superiority of DNA  
03:32:46PM 22 evidence. They did find it improper when the  
03:32:46PM 23 prosecutor stated that the defense attorney knew  
03:32:46PM 24 about the strength of DNA, because they found that  
03:32:52PM 25 that comment impugned the integrity of opposing

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03:32:58PM 1 counsel. But they found that the improper comments  
03:32:58PM 2 were not so serious as to have affected the  
03:33:01PM 3 defendant's right to a fair trial.

03:33:04PM 4 And they noted again the Court's role in  
03:33:07PM 5 reminding the jury that lawyers' comments are not  
03:33:10PM 6 evidence and inappropriately using the jury  
03:33:15PM 7 instructions to focus the jury's attention on the  
03:33:18PM 8 evidence.

03:33:19PM 9 The States versus Hughes case is a 1998  
03:33:21PM 10 Arizona Supreme Court case. I've mentioned it many  
03:33:24PM 11 times in this case as the masterpiece of misconduct  
03:33:31PM 12 in the prosecutor's rebuttal argument in that case.

03:33:36PM 13 And, again, Your Honor, when the Court  
03:33:38PM 14 reviews that case, it's a good case to use as a  
03:33:41PM 15 benchmark to look at conduct that is clearly  
03:33:44PM 16 egregious, clearly improper, and to put in  
03:33:47PM 17 appropriate context the arguments that the defense  
03:33:50PM 18 is making in their motion for new trial here.

03:33:52PM 19 Because, again, that's a Pima County case  
03:33:55PM 20 where the prosecutors had argued that the  
03:33:58PM 21 psychiatrist created excuses for criminals, that  
03:34:03PM 22 the defense attorney had paid the doctor to  
03:34:05PM 23 fabricate a diagnosis, argued that the mental  
03:34:09PM 24 health experts were mouthpieces for the defendant,  
03:34:12PM 25 told the jury that the defendant had lied to the  
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03:34:15PM 1 psychiatrist, told the jury about Rule 11  
03:34:18PM 2 proceedings and other court proceedings that were  
03:34:21PM 3 clearly inadmissible, improperly commented on the  
03:34:24PM 4 defendant's failure to testify, suggested that  
03:34:27PM 5 psychiatrists were an impediment to truth and  
03:34:32PM 6 justice and then appealed to the jury's fear that  
03:34:34PM 7 the defendant would murder again if they acquitted  
03:34:37PM 8 him.

03:34:41PM 9 Your Honor, I cited a number of other  
03:34:43PM 10 cases in our response about prosecutors' closing  
03:34:48PM 11 arguments. I won't take the time now to continue  
03:34:52PM 12 to talk about the cases. But I do, again, find  
03:34:55PM 13 them to be very instructive to set the benchmark as  
03:34:58PM 14 to what is improper in closing arguments and use it  
03:35:03PM 15 to compare it to the arguments made in defendant's  
03:35:07PM 16 motion for new trial here.

03:35:11PM 17 A repeated theme in all of these cases is  
03:35:15PM 18 that even if improper comments were made, that the  
03:35:17PM 19 jury instructions and cautionary instructions from  
03:35:20PM 20 the Court serve -- when you're talking about  
03:35:25PM 21 closing arguments, that they serve that appropriate  
03:35:27PM 22 role in focusing the jury's attention and rendering  
03:35:30PM 23 any improper comments harmless.

03:35:37PM 24 The rest of the defendant's motion is  
03:35:40PM 25 devoted to the -- my arguments in closing, rebuttal  
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03 35 45PM 1 closing, and aggravation closing arguments. I've  
 03 35 49PM 2 already discussed the one error that I made in my  
 03 35 53PM 3 aggravation closing as well as the error made in my  
 03 36 02PM 4 closing during the guilt phase, admitted that those  
 03 36 04PM 5 were clearly error. I'm not going to reiterate my  
 03 36 07PM 6 argument that those were harmless and appropriately  
 03 36 09PM 7 addressed at the time. I think I've made a good  
 03 36 10PM 8 record on that.

03 36 12PM 9 Beyond those two statements, Your Honor,  
 03 36 16PM 10 there is simply no basis when looking at the other  
 03 36 18PM 11 issues that the defendant raises in their motion --  
 03 36 20PM 12 there is no basis to find there were any other  
 03 36 25PM 13 improper comments or any other errors, anything  
 03 36 28PM 14 arising to the level of prosecutorial misconduct  
 03 36 31PM 15 whatsoever in the remainder the state's arguments  
 03 36 34PM 16 during closing, rebuttal closing and aggravation  
 03 36 36PM 17 closing.

03 36 38PM 18 Furthermore, as I've reminded the Court,  
 03 36 42PM 19 the Court gave jury instructions and cautionary  
 03 36 45PM 20 instructions whenever the defense requested  
 03 36 48PM 21 pertaining to those closing arguments.

03 36 50PM 22 I want to just touch on a couple, and  
 03 36 52PM 23 then I'll sit down. I'm almost finished,  
 03 36 55PM 24 Your Honor. And, again, I appreciate your  
 03 36 57PM 25 patience.

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03 36 59PM 1 What the defense alleges in the motion,  
 03 37 02PM 2 that my comments offered in closing to explain why  
 03 37 04PM 3 the state's investigation did not focus on  
 03 37 07PM 4 organophosphates -- and those were comments  
 03 37 11PM 5 explaining -- repeating testimony as to how and  
 03 37 14PM 6 when the state learned of the organophosphates  
 03 37 17PM 7 issue -- the argument is made in the motion for new  
 03 37 19PM 8 trial that those comments in my closing were  
 03 37 23PM 9 improper and constitute burden shifting.

03 37 26PM 10 Case law is clear that a prosecutor can  
 03 37 28PM 11 comment on a defendant's failure to present  
 03 37 32PM 12 evidence to support his theory of the case and that  
 03 37 36PM 13 doing so is neither burden shifting nor a comment  
 03 37 39PM 14 on a defendant's failure to testify.

03 37 41PM 15 I did not go that far. But I'm pointing  
 03 37 44PM 16 it out to the Court that had I gone that far, that  
 03 37 46PM 17 would have been entirely appropriate and supported  
 03 37 47PM 18 by case law.

03 37 49PM 19 At trial and in support of a Willits  
 03 37 51PM 20 instruction, the defense argued that by failing to  
 03 37 53PM 21 test for the organophosphates at the time of the  
 03 37 57PM 22 autopsies, the state lost evidence that could have  
 03 38 00PM 23 proven the organophosphates theory.

03 38 02PM 24 As I argued to the Court, and I'll make a  
 03 38 04PM 25 record again now, that argument entitled the state

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03 38 07PM 1 to explain how and when we learned of the  
 03 38 09PM 2 organophosphates theory and explained our failure  
 03 38 13PM 3 to test.

03 38 14PM 4 The Willits instruction is clear that the  
 03 38 16PM 5 jury can consider the state's explanation for loss  
 03 38 20PM 6 or failure to preserve evidence. And that's  
 03 38 23PM 7 exactly what we do.

03 38 28PM 8 I cited numerous cases in my response,  
 03 38 31PM 9 Your Honor, for the legal support that when a  
 03 38 36PM 10 prosecutor comments on a defendant's failure to  
 03 38 38PM 11 present evidence to support his or her theory of  
 03 38 42PM 12 the case, it is neither improper nor shifts the  
 03 38 46PM 13 burden of proof to the defendant so long as such  
 03 38 49PM 14 comments are not intended to direct the jury's  
 03 38 53PM 15 attention the defendant's failure to testify.

03 38 55PM 16 And that's clearly what I did in my  
 03 38 57PM 17 closing. I did not draw attention to the  
 03 39 01PM 18 defendant's failure to testify. We simply  
 03 39 02PM 19 explained how and when the state's investigator  
 03 39 05PM 20 learned of the organophosphates issue.

03 39 08PM 21 It was a recurring theme throughout the  
 03 39 11PM 22 trial. The defense has admitted it in argument  
 03 39 15PM 23 that that was one of their defenses was their  
 03 39 17PM 24 attack on the quality of the state's investigation.  
 03 39 20PM 25 And it was entirely appropriate, then, for the

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03 39 23PM 1 state to explain to the jury how the investigation  
 03 39 27PM 2 proceeded and what the detective did and when,  
 03 39 31PM 3 particularly when we learned of the  
 03 39 32PM 4 organophosphates and how and why and the results of  
 03 39 36PM 5 our attempts at that time to test the blood.

03 39 51PM 6 The defendant's motion for a new trial  
 03 39 56PM 7 claims that my comments -- when I discussed the  
 03 39 59PM 8 organophosphates theory, I told the jury that the  
 03 40 03PM 9 theory was ridiculous, baloney, a house of cards or  
 03 40 07PM 10 akin to a take-out menu from an expensive diner.  
 03 40 11PM 11 They have listed those comments as prosecutorial  
 03 40 14PM 12 misconduct and grounds for a new trial.

03 40 17PM 13 Those comments are clearly not improper.  
 03 40 20PM 14 They are clearly permissible, and they are clearly  
 03 40 25PM 15 supported by the cases that I've quoted to the  
 03 40 29PM 16 Court today and set forth in our response.

03 40 32PM 17 Prosecutors are given wide latitude. And  
 03 40 35PM 18 that language I used is clearly permissible to  
 03 40 38PM 19 counter the organophosphates theory. Again, this  
 03 40 41PM 20 is another area where the defense motion for new  
 03 40 45PM 21 trial claims that it was error, but there is no  
 03 40 48PM 22 legal support offered whatsoever for that position.

03 40 54PM 23 And then, finally, any argument that the  
 03 40 57PM 24 defendant was deprived of a fair trial is negated  
 03 41 01PM 25 by the fact that the Court gave the jury three

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03:41:04PM 1 cautionary jury instructions on this issue to cure  
03:41:07PM 2 any harm, two times during my closing argument and  
03:41:09PM 3 one time during my examination of Ross Diskin.

03:41:14PM 4 I would remind the Court that the fact  
03:41:19PM 5 that cautionary instructions are given does not  
03:41:21PM 6 mean that error or misconduct occurred, as the  
03:41:24PM 7 defense motion for new trial seems to argue, but  
03:41:28PM 8 simply that that is an appropriate way that the  
03:41:30PM 9 Court has addressed issues that they came up.

03:41:30PM 10 And I would draw the Court's attention to  
03:41:32PM 11 the State versus Poole case that specifically says  
03:41:36PM 12 that that's how the Court should handle what's  
03:41:40PM 13 going on in a courtroom. The State versus Poole  
03:41:42PM 14 case uses language that -- I believe that case  
03:41:47PM 15 actually says that there never should be a motion  
03:41:50PM 16 for new trial based on prosecutorial misconduct  
03:41:53PM 17 because the Court has the tools to address issues  
03:41:56PM 18 as they arise.

03:41:57PM 19 And I would submit to the Court that in  
03:42:00PM 20 this case that's exactly what this court did. As  
03:42:02PM 21 issues arose, the Court listened to arguments. The  
03:42:06PM 22 Court gave cautionary instructions. The Court gave  
03:42:08PM 23 appropriate jury instructions. And under the tests  
03:42:11PM 24 set out in Poole and Hughes, the Court did exactly  
03:42:15PM 25 what the Arizona court contemplates.

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03:42:26PM 1 Your Honor, I'm not going to spend more  
03:42:28PM 2 time on that issue. I would ask the Court to  
03:42:31PM 3 review the state's response where we set forth when  
03:42:36PM 4 the Court gave the cautionary instructions. We  
03:42:38PM 5 cite to the transcript when that cautionary  
03:42:41PM 6 instruction on this burden shifting issue was  
03:42:45PM 7 given, and it was given a total of three times,  
03:42:47PM 8 twice during closing as well as during the  
03:42:51PM 9 testimony of Detective Diskin.

03:42:57PM 10 I would also remind the Court that -- and  
03:42:58PM 11 I didn't count up the number of times. But  
03:43:01PM 12 repeatedly throughout this trial this court  
03:43:05PM 13 reminded the jury that the lawyers' comments are  
03:43:07PM 14 not evidence.

03:43:08PM 15 The defense motion for mistrial alleges  
03:43:12PM 16 that I engaged in improper vouching when I used the  
03:43:15PM 17 term, quote, "we know" during my closing argument.  
03:43:19PM 18 And in the motion the motion states that I used the  
03:43:24PM 19 terms in my closing and in my rebuttal close and in  
03:43:28PM 20 my aggravation close. But the motion does not  
03:43:31PM 21 provide any references to transcripts other than  
03:43:36PM 22 the two times I made that statement in my first  
03:43:38PM 23 closing in the guilt phase.

03:43:38PM 24 I do not recall using that phrase after  
03:43:42PM 25 the time at which it was brought to my attention.

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03:43:45PM 1 I used that term early on, and there was an  
03:43:48PM 2 objection, and the Court addressed it. At the time  
03:43:52PM 3 the Court advised -- the Court's conclusion that my  
03:43:56PM 4 use of the term was inadvertent, as it was.

03:44:00PM 5 The Court's impression that I was using  
03:44:03PM 6 the term "we know" simply to summarize the  
03:44:06PM 7 evidence, which is how I was using it, is set forth  
03:44:10PM 8 in the trial transcript on June 15, 2011, on  
03:44:14PM 9 page 49.

03:44:16PM 10 After that issue was brought to my  
03:44:18PM 11 attention, I made a concerted effort to avoid using  
03:44:22PM 12 those words. If I used it again in my rebuttal  
03:44:26PM 13 close or in my aggravation close, as the defense  
03:44:28PM 14 argues in their motion, I would stand corrected.  
03:44:32PM 15 But I do not believe that I used it after the issue  
03:44:33PM 16 was first brought to my attention early on.

03:44:36PM 17 And, again, the Court recognized I was  
03:44:37PM 18 not using it to suggest to the jury that we had  
03:44:40PM 19 information that the jury had not heard but simply  
03:44:43PM 20 using it to summarize what the evidence was  
03:44:47PM 21 showing.

03:44:50PM 22 The defense alleges that those comments  
03:44:53PM 23 were improper vouching by the prosecutor. And I  
03:44:57PM 24 would just bring to the Court's attention the cases  
03:44:58PM 25 that discuss what vouching is. There is two types

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03:45:03PM 1 of improper prosecutorial vouching. One involves  
03:45:08PM 2 placing the prestige of a government behind a  
03:45:11PM 3 witness. And the other suggests that additional,  
03:45:13PM 4 unrevealed evidence supports a guilty verdict.  
03:45:16PM 5 Both are clearly improper and neither of which did  
03:45:18PM 6 the state or I engage in during this trial.

03:45:21PM 7 We've set forth several cases in our  
03:45:23PM 8 response that discuss improper prosecutorial  
03:45:27PM 9 vouching, including State versus Palmer and State  
03:45:32PM 10 versus Salcedo. Both are Arizona cases. I agree  
03:45:36PM 11 that the term "we know" would be improper if I had  
03:45:40PM 12 used it to suggest that we had information that we  
03:45:45PM 13 were not telling the jury about. But I believe  
03:45:48PM 14 that the Court at the time noted on the record your  
03:45:51PM 15 impression and your agreement that I was simply  
03:45:54PM 16 using it to summarize evidence.

03:46:02PM 17 Your Honor, that issue was addressed by  
03:46:11PM 18 the Court. And I've set forth in our response  
03:46:16PM 19 several passages in the trial transcript on June 15  
03:46:20PM 20 where the defense objected. We made a record, and  
03:46:28PM 21 the Court made your observation that, quote, I did  
03:46:28PM 22 not take those comments in that vein.

03:46:30PM 23 And I would simply direct the Court to  
03:46:32PM 24 our response but urge the Court, first of all, to  
03:46:38PM 25 find that there was no error or prosecutorial

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03:46:38PM 1 misconduct. But, in any event, clearly the jury  
03:46:41PM 2 was admonished time and again that lawyers'  
03:46:44PM 3 comments are not evidence.

03:46:47PM 4 The State versus LeBlanc case cited in  
03:46:50PM 5 our response -- and it's found at 186 Ariz. 437 --  
03:47:02PM 6 states that jurors are presumed to follow the  
03:47:08PM 7 Judge's instructions. And, therefore, even if the  
03:47:11PM 8 prosecutor's comments constitutes error, the jury  
03:47:14PM 9 instructions help negate or mitigate any  
03:47:17PM 10 deleterious effect.

03:47:20PM 11 In the defense motion for mistrial or new  
03:47:23PM 12 trial -- I'm sorry -- another incident that they  
03:47:26PM 13 allege is prosecutorial misconduct is this topic of  
03:47:29PM 14 vicarious liability. It's in the defense motion.  
03:47:32PM 15 Again, no legal support is provided for this  
03:47:35PM 16 argument that the state erroneously implied  
03:47:38PM 17 vicarious liability during closing arguments.

03:47:41PM 18 My comments were a proper comment on the  
03:47:44PM 19 evidence. And the extent of the control that the  
03:47:47PM 20 defendant had exercised over the conduct of the  
03:47:50PM 21 sweat lodge, there was simply absolutely no  
03:47:53PM 22 misconduct in the state's remarks regarding the  
03:47:56PM 23 defendant's position as JRI or his control over the  
03:48:00PM 24 sweat lodge.

03:48:03PM 25 And as previously noted in our response,  
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03:48:06PM 1 in finding that the state had timely disclosed the  
03:48:09PM 2 corporate reports of JRI, the Court itself had  
03:48:12PM 3 noted the following: That throughout the trial the  
03:48:15PM 4 defense has attempted to convey to the jury and to  
03:48:18PM 5 this court its view of the importance of the legal  
03:48:21PM 6 distinction between Mr. Ray personally and the  
03:48:24PM 7 corporation JRI.

03:48:27PM 8 The defense cross-examined a witness who  
03:48:30PM 9 had been employed by JRI at the time of the  
03:48:33PM 10 incident extensively on the subject of corporate  
03:48:36PM 11 structure and personnel of JRI. It was through  
03:48:39PM 12 cross-examination by the defense that evidence of  
03:48:42PM 13 the distinction has been presented at the trial.  
03:48:45PM 14 And that's set forth in the Court's ruling on  
03:48:48PM 15 4/19/2011 at page 3.

03:48:51PM 16 Your Honor, in my response I made a  
03:48:54PM 17 further record on this point, but again, no legal  
03:48:57PM 18 authority offered for the argument that my arguing  
03:49:00PM 19 to the defense -- to the jury that the defense  
03:49:03PM 20 controlled -- or that the defendant controlled the  
03:49:06PM 21 sweat lodge is error in any regard let alone  
03:49:09PM 22 prosecutorial misconduct.

03:49:12PM 23 And just a few more points, Your Honor,  
03:49:15PM 24 and then I will sit down.

03:49:18PM 25 The defense has argued that I improperly  
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03:49:19PM 1 drew the jury's attention to the victims and  
03:49:22PM 2 appealed to their emotion and prejudice. I won't  
03:49:25PM 3 take more time now, but I believe there is simply  
03:49:28PM 4 no support for that, again no citation to the  
03:49:31PM 5 record and, again, no legal support provided.

03:50:01PM 6 In our response I cited a number of  
03:50:04PM 7 cases, many, many cases, that, again, refer to  
03:50:07PM 8 comments in closing arguments that are improper and  
03:50:10PM 9 then comments in closing that are improper and  
03:50:13PM 10 grounds for a new trial -- and those are very, very  
03:50:16PM 11 egregious -- and then comments that are simply not  
03:50:19PM 12 improper at all.

03:50:22PM 13 And I believe with the exception of the  
03:50:25PM 14 two that the -- we have fully and freely admitted  
03:50:28PM 15 were error, that there were no other errors made in  
03:50:31PM 16 the closing arguments let alone anything that  
03:50:34PM 17 constitutes prosecutorial misconduct.

03:50:37PM 18 The -- one of the -- another allegation  
03:50:40PM 19 in the state's motion for new trial is that the  
03:50:43PM 20 state made incorrect statements of fact and  
03:50:46PM 21 incorrect inferences not supported by the record in  
03:50:49PM 22 closing arguments.

03:51:02PM 23 Again, there is no direct references for  
03:51:05PM 24 us to look at. And I don't believe that there is  
03:51:08PM 25 any support for this court to find any error in

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03:51:11PM 1 that regard. During the state's rebuttal close the  
03:51:14PM 2 defendant objected multiple times claiming the  
03:51:17PM 3 state's argument misstated the evidence.

03:51:20PM 4 This court promptly responded again by  
03:51:23PM 5 instructing the jury that the lawyers' statements  
03:51:26PM 6 were not evidence. And, moreover, this court  
03:51:29PM 7 agreed with the state regarding the one objection  
03:51:32PM 8 relating to Dr. Mosley, stating -- when I told the  
03:51:35PM 9 jury he had stayed with his original opinion  
03:51:38PM 10 relating to the cause of death. And that's set  
03:51:41PM 11 forth in the trial transcript on June 21st, 2011,  
03:51:44PM 12 on page 22, lines 3 to 13.

03:51:47PM 13 Your Honor, the state does not agree with  
03:51:50PM 14 the defendant's characterization of the closing  
03:51:53PM 15 arguments in this case. While we do have not  
03:51:56PM 16 transcripts of the testimony of Dr. Paul or Ms. Sy,  
03:51:59PM 17 the state's comments related to their testimony in  
03:52:02PM 18 our closing were based on the state's notes and  
03:52:05PM 19 recollection and accurate to the best of our  
03:52:08PM 20 knowledge.

03:52:11PM 21 And, further, contrary to the assertion  
03:52:14PM 22 by the -- that's made in the defendant's motion for  
03:52:17PM 23 new trial, the state did not misrepresent  
03:52:20PM 24 Detective Barbaro's recollection of defendant's  
03:52:23PM 25 initial response to his question regarding who was

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03 52 28PM 1 in charge of the sweat lodge.  
 03 52 37PM 2 The defense has alleged that the state  
 03 52 42PM 3 made numerous incorrect statements of law in the  
 03 52 47PM 4 closing arguments. We have been unable to find  
 03 52 50PM 5 what those statements are that are referenced in  
 03 52 52PM 6 the defendant's motion as they are not specifically  
 03 52 54PM 7 pointed out.

03 52 57PM 8 What we did find are proper arguments,  
 03 53 00PM 9 including reading from the jury instructions, the  
 03 53 05PM 10 elements of both manslaughter and negligent  
 03 53 07PM 11 homicide and the definition of what a gross  
 03 53 09PM 12 deviation of a standard of conduct that a  
 03 53 11PM 13 reasonable person would observe in that situation  
 03 53 12PM 14 is.

03 53 14PM 15 And the final statement to the jury, the  
 03 53 16PM 16 state had made the following charge to the jury:  
 03 53 18PM 17 We are here, ladies and gentlemen, because  
 03 53 21PM 18 Mr. Ray -- because of his conduct. We are here  
 03 53 23PM 19 because Mr. Ray intentionally used heat to create  
 03 53 25PM 20 this altered mental status and was criminally  
 03 53 27PM 21 reckless about the consequences. That is what  
 03 53 31PM 22 manslaughter is about. And I ask you again to find  
 03 53 34PM 23 the defendant, Mr. Ray, guilty on all three counts.

03 53 37PM 24 I'm simply unable in any of that to find  
 03 53 41PM 25 any basis for the arguments that are set forth in

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03 53 48PM 1 the defendant's motion for new trial that somehow  
 03 53 52PM 2 there was error let alone prosecutorial misconduct.

03 53 56PM 3 All of those arguments made in the  
 03 53 58PM 4 closing statements from the guilt phase to the  
 03 54 01PM 5 aggravation phase were arguments that were properly  
 03 54 05PM 6 inferred from the evidence, and there was nothing  
 03 54 07PM 7 improper at all.

03 54 09PM 8 The defense has made an argument in the  
 03 54 11PM 9 motion for the new trial pertaining to the  
 03 54 15PM 10 Rule 404(b) and related rulings. And, again, there  
 03 54 20PM 11 is simply no basis for that argument that any error  
 03 54 24PM 12 was made at all.

03 54 25PM 13 The Court has heard repeated arguments  
 03 54 28PM 14 relating to the admissibility of the 2007 and 2008  
 03 54 33PM 15 sweat lodge ceremonies. The evidence that was  
 03 54 35PM 16 presented at trial was presented for the purposes  
 03 54 37PM 17 of establishing and arguing causation, specifically  
 03 54 41PM 18 what the Court admitted the prior sweat lodge  
 03 54 44PM 19 information to address. We stayed appropriately  
 03 54 47PM 20 and carefully within those boundaries. And there  
 03 54 49PM 21 is just no purpose -- there is no support  
 03 54 55PM 22 whatsoever for the defense to argue that there was  
 03 54 58PM 23 error in the state's closing argument in that  
 03 55 04PM 24 regard.

The motion for a new trial claims that

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03 55 08PM 1 the -- there was improper vouching when I responded  
 03 55 14PM 2 to Mr. Li's closing argument about the county  
 03 55 21PM 3 attorney herself prosecuting the case.

03 55 23PM 4 First, the case law is clear that  
 03 55 28PM 5 prosecutors can respond in rebuttal to remarks made  
 03 55 32PM 6 by defense attorneys in their closing arguments.  
 03 55 35PM 7 And, second, the statement made was simply that I  
 03 55 40PM 8 am a working county attorney. And that is not  
 03 55 42PM 9 vouching in any way.

03 55 43PM 10 The defense has offered no legal support  
 03 55 45PM 11 for the proposition that my telling the jury that  
 03 55 48PM 12 I'm a working county attorney is somehow improper  
 03 55 52PM 13 vouching.

03 55 52PM 14 And I just -- the second statement that I  
 03 55 55PM 15 had made was in response to Mr. Li's extended  
 03 55 58PM 16 comments about the state's secret meeting. The  
 03 56 01PM 17 statement was objected to during the closing, and  
 03 56 04PM 18 there was a sidebar where we argued the issue with  
 03 56 07PM 19 the Court.

03 56 08PM 20 We made a full record at the time, and we  
 03 56 11PM 21 have made a full record in our response that my  
 03 56 18PM 22 rebuttal arguments, my rebuttal comments, to the  
 03 56 19PM 23 jury in response to Mr. Li's comments about the  
 03 56 24PM 24 secret meeting were appropriate and not improper in  
 03 56 26PM 25 any way.

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03 56 34PM 1 Based on the evidence and the defendant's  
 03 56 36PM 2 closing, Your Honor, which the state was entitled  
 03 56 38PM 3 by law to rebut, there was simply nothing improper  
 03 56 44PM 4 in the state's comments to the jury.

03 56 52PM 5 In the defendant's motion for new trial,  
 03 56 55PM 6 it is alleged that the state commented on the  
 03 57 00PM 7 defendant's right to testify. That's simply  
 03 57 03PM 8 untrue. And there is no basis whatsoever for that  
 03 57 06PM 9 argument to be made in the motion for new trial.

03 57 10PM 10 The state made a comment, reading the  
 03 57 13PM 11 jury instruction about determining the credibility  
 03 57 15PM 12 of witnesses. And that comment was directed toward  
 03 57 19PM 13 the defendant's attack on the credibility of the  
 03 57 23PM 14 Hamiltons and asking the jury to focus on their  
 03 57 26PM 15 spiritual beliefs.

03 57 27PM 16 That comment at issue I then responded  
 03 57 30PM 17 to. And I responded by reading to the jury the  
 03 57 35PM 18 entire instruction that the Court had given the  
 03 57 37PM 19 jury at the defendant's request that the defendant  
 03 57 40PM 20 had the right to his religious and spiritual  
 03 57 47PM 21 beliefs.

03 57 47PM 22 So I read the language directly from that  
 03 57 49PM 23 jury instruction. And the defense now argues that  
 03 57 51PM 24 that was an improper comment on the defendant's  
 03 57 54PM 25 decision not to testify.

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03 57 56PM 1 Again, there is simply no basis in the  
03 58 00PM 2 record that that was error in any regard. And  
03 58 02PM 3 there is no basis that that comment in reading the  
03 58 04PM 4 jury instruction somehow was a comment on the  
03 58 06PM 5 defendant's exercise of his right not to testify.

03 58 13PM 6 Furthermore, the jury was instructed that  
03 58 16PM 7 they could not hold it against the defendant, his  
03 58 19PM 8 decision not to testify. And the case law is clear  
03 58 22PM 9 that a jury is presumed to follow the Court's jury  
03 58 25PM 10 instructions.

03 58 32PM 11 The motion for new trial argues that  
03 58 36PM 12 the -- in the aggravation phase that I made an  
03 58 41PM 13 improper argument when I argued to the jury that  
03 58 44PM 14 Mr. Ray was JRI and that Mr. Ray profited from the  
03 58 46PM 15 sweat lodge ceremony.

03 58 50PM 16 Both of those arguments were directed  
03 58 53PM 17 specifically towards the alleged aggravating  
03 58 56PM 18 circumstance that the defendant had committed the  
03 58 58PM 19 offense and the expectation of pecuniary gain.  
03 59 02PM 20 And, as the Court knows, the jury was hung on that  
03 59 04PM 21 issue. In other words, they did not return a  
03 59 06PM 22 verdict in favor of that aggravating circumstance.

03 59 08PM 23 I don't agree that my argument was error  
03 59 11PM 24 in any way. But there is no question that if it  
03 59 14PM 25 was, it was harmless because the jury got hung on

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03 59 18PM 1 that aggravating circumstance.

03 59 25PM 2 I believe, Your Honor, that I have  
03 59 27PM 3 appropriately and at some length gone through our  
03 59 32PM 4 total count of 31 allegations of prosecutorial  
03 59 37PM 5 misconduct. And to summarize, again, I believe  
03 59 40PM 6 that there were three errors. I believe that the  
03 59 44PM 7 Court appropriately addressed those errors. None  
03 59 46PM 8 of those errors arise to the level of prosecutorial  
03 59 49PM 9 misconduct.

03 59 49PM 10 Again, I would urge the Court to look at  
03 59 51PM 11 the cases and how they define "prosecutorial  
03 59 56PM 12 misconduct." And clearly those three errors do not  
03 59 58PM 13 constitute prosecutorial misconduct.

04 00 01PM 14 It is the duty of the state to seek  
04 00 04PM 15 justice, not a win. Clearly prosecutors are  
04 00 10PM 16 ministers of justice. And clearly it is our  
04 00 12PM 17 obligation to make sure the defendant has a fair  
04 00 14PM 18 trial. And clearly that is what we tried to do  
04 00 18PM 19 throughout this trial.

04 00 19PM 20 We are very much aware of our obligation  
04 00 22PM 21 as ministers of justice. And everything we did was  
04 00 25PM 22 geared toward a fair trial. We didn't argue  
04 00 28PM 23 anything for any improper purpose. We certainly  
04 00 32PM 24 didn't engage in any knowing conduct that was  
04 00 34PM 25 designed to unduly influence the jury or to deprive

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04 00 38PM 1 the defendant of a fair trial, which would be the  
04 00 41PM 2 test for a new trial based on prosecutorial  
04 00 45PM 3 misconduct.

04 00 45PM 4 The record in this case does not support  
04 00 48PM 5 nor is there any evidence that the state engaged in  
04 00 51PM 6 intentional misconduct for an improper purpose or  
04 00 55PM 7 indifference to the significant resulting danger of  
04 00 58PM 8 mistrial.

04 00 59PM 9 Your Honor, I would ask that the Court  
04 01 00PM 10 deny the motion for mistrial -- I'm sorry. For new  
04 01 06PM 11 trial.

04 01 09PM 12 I want to just briefly touch on the  
04 01 13PM 13 statement that Mr. Kelly made this morning, and  
04 01 15PM 14 then I'll sit down. And his suggestion to the  
04 01 20PM 15 Court was that the state had to prove beyond a  
04 01 24PM 16 reasonable doubt that -- that the defendant was not  
04 01 30PM 17 prejudiced by any of the alleged acts of the state.

04 01 33PM 18 That simply is not true. There are a  
04 01 38PM 19 line of cases that talk about motions for new trial  
04 01 40PM 20 when inadmissible evidence went to the jury. And  
04 01 43PM 21 when the error is that inadmissible evidence went  
04 01 47PM 22 to the jury, then the cases do say that the state  
04 01 51PM 23 has to prove that the jury was not prejudiced and  
04 01 54PM 24 that the defendant did not receive a trial  
04 01 57PM 25 beyond -- proof beyond a reasonable doubt.

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04 01 59PM 1 That's not the case here. The case here  
04 02 03PM 2 deals with other issues, not inadmissible evidence  
04 02 08PM 3 that went to the jury, with the exception of the  
04 02 10PM 4 one unadmitted portion of the audio.

04 02 13PM 5 The cases that the defense cites in  
04 02 15PM 6 support of that argument precede the State versus  
04 02 19PM 7 Hughes case. And clearly the state versus Hughes  
04 02 23PM 8 case is what I quoted to the Court already, that  
04 02 26PM 9 the defendant has the burden to show that the acts  
04 02 31PM 10 that they claim are prosecutorial misconduct  
04 02 34PM 11 deprived him of a fair trial.

04 02 36PM 12 In this case only one out of the 31  
04 02 38PM 13 allegations of misconduct resulted in inadmissible  
04 02 43PM 14 evidence going to the jury. And that was the  
04 02 45PM 15 playing of that audio -- of the unadmitted audio  
04 02 48PM 16 from Exhibit 744. And I've already made a full  
04 02 54PM 17 record that that audio, and it's clear from my  
04 02 56PM 18 argument at the time -- first of all, that was not  
04 02 59PM 19 in the guilt phase at all. Secondly, it was in the  
04 03 03PM 20 aggravation phase only in support of the  
04 03 08PM 21 aggravating circumstance of pecuniary gain.

04 03 10PM 22 So the state does have the burden in that  
04 03 12PM 23 instance only to prove that beyond a reasonable  
04 03 15PM 24 doubt that the jury was not influenced or  
04 03 19PM 25 prejudiced. And clearly they were not because they

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04 03 22PM 1 got hung on that aggravating circumstance.  
 04 03 25PM 2 Beyond that one issue, all remaining 30  
 04 03 28PM 3 issues, incidents, that the defense claims are  
 04 03 31PM 4 error and prosecutorial misconduct, the standard  
 04 03 34PM 5 for review is that set out in the State versus  
 04 03 37PM 6 Hughes case.  
 04 03 39PM 7 And I have repeated it now many times to  
 04 03 42PM 8 the Court. And I won't. But, essentially, it  
 04 03 45PM 9 involves improper conduct, intentional conduct, by  
 04 03 48PM 10 the prosecutor for improper purpose resulting in  
 04 03 51PM 11 denial of a fair trial for the defendant.  
 04 03 54PM 12 I would just end with submitting to the  
 04 03 57PM 13 Court that of the three errors that occurred,  
 04 04 00PM 14 clearly the Court appropriately addressed them.  
 04 04 03PM 15 The remaining 28 simply are not errors. And there  
 04 04 06PM 16 is no grounds for the Court -- there is no grounds  
 04 04 09PM 17 in the record, basis in the record, for the Court  
 04 04 12PM 18 to find that any of those were errors let alone  
 04 04 15PM 19 prosecutorial misconduct.  
 04 04 18PM 20 And then, finally, I would point the  
 04 04 21PM 21 Court to the Poole case and point out that this  
 04 04 24PM 22 court clearly followed what the supreme court said  
 04 04 27PM 23 in Poole, which is that this court controls and  
 04 04 30PM 24 avoids ultimately the need for new trial by giving  
 04 04 33PM 25 appropriate cautionary instructions and jury  
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04 04 41PM 1 instructions, as this court did, throughout.  
 04 04 44PM 2 Thank you, Your Honor. Again, I  
 04 04 47PM 3 appreciate your patience. I know I've taken a long  
 04 04 50PM 4 time. And I appreciate the opportunity to make a  
 04 04 53PM 5 full record on this motion.  
 04 04 56PM 6 THE COURT: Thank you, Ms. Polk.  
 04 04 59PM 7 I want to take about a 10-minute recess.  
 04 05 02PM 8 And we will start with your reply at that  
 04 05 05PM 9 point.  
 04 05 08PM 10 Thank you.  
 04 05 11PM 11 (Recess.)  
 04 05 14PM 12 THE COURT: The record will show the presence  
 04 05 17PM 13 of Mr. Ray and the attorneys.  
 04 05 20PM 14 Mr. Kelly.  
 04 05 23PM 15 MR. KELLY: Judge, again, I'd emphasize my  
 04 05 26PM 16 brief comments this morning that it's incumbent  
 04 05 29PM 17 upon this court to consider the cumulative effect  
 04 05 32PM 18 of the misconduct which has permeated throughout  
 04 05 35PM 19 the course of this lengthy trial and the pretrial  
 04 05 38PM 20 proceedings and ultimately make a decision as to  
 04 05 41PM 21 whether or not James Ray received a fair trial.  
 04 05 44PM 22 The record in this case, I would submit,  
 04 05 47PM 23 speaks for itself. I would submit that during the  
 04 05 50PM 24 past four hours Ms. Polk has made many  
 04 05 53PM 25 misstatements of facts in regards to the record.  
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04 17 47PM 1 And I'd point, Judge, if you have a copy of our  
 04 17 50PM 2 motion in front of you, if you and Ms. Polk would  
 04 17 53PM 3 turn to Exhibit R, which is the reporter's  
 04 18 03PM 4 transcript of proceedings from June 29, 2011.  
 04 18 06PM 5 THE COURT: Okay.  
 04 18 09PM 6 MR. KELLY: And that one-page transcript is  
 04 18 12PM 7 the actual discussion with the Court in regards to  
 04 18 15PM 8 the third admitted error by the state and the  
 04 18 18PM 9 admonition, I guess, or warning provided by this  
 04 18 21PM 10 court.  
 04 18 24PM 11 And after asking us to stop the audio and  
 04 18 27PM 12 approach, I clearly state, this is not in evidence.  
 04 18 30PM 13 Ms. Polk says, this is in evidence.  
 04 18 33PM 14 You asked the question, it is or it  
 04 18 36PM 15 isn't?  
 04 18 39PM 16 She replies, it is, Your Honor. I  
 04 18 42PM 17 checked the exhibit list. It's in evidence.  
 04 18 45PM 18 Have you looked at the exhibit list?  
 04 18 48PM 19 I respond, if it is, it's a mistake.  
 04 18 51PM 20 It's never been played in front of this jury. I've  
 04 18 54PM 21 never heard it. I'd move for a mistrial.  
 04 18 57PM 22 You respond, I don't recall hearing that.  
 04 19 00PM 23 Ms. Polk says, Your Honor, it was played  
 04 19 03PM 24 in my opening, and then I moved to admit all those  
 04 19 06PM 25 audios. And it was admitted at the beginning of  
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04 19 32PM 1 trial.  
 04 19 35PM 2 I state, Judge, we need to take a break.  
 04 19 38PM 3 This is a serious problem.  
 04 19 41PM 4 Ms. Polk again states, this is evidence  
 04 19 44PM 5 that was admitted at trial.  
 04 19 47PM 6 And you cautioned the state by saying, if  
 04 19 50PM 7 it's admitted at trial, then it's admitted. If  
 04 19 53PM 8 it's not admitted, then it's right into a mistrial.  
 04 19 56PM 9 Now, Judge, the reason I took time to  
 04 19 59PM 10 summarize that exchange with the Court is, if you  
 04 20 02PM 11 recall then, the jury was present. We're at the  
 04 20 05PM 12 conclusion of a very lengthy trial. You came back  
 04 20 08PM 13 from the bench and asked me whether or not we had a  
 04 20 11PM 14 chance to review the exhibit. We had a very brief  
 04 20 14PM 15 chance.  
 04 20 17PM 16 And I said something to the effect -- and  
 04 20 20PM 17 this is on the record -- without waiving any  
 04 20 23PM 18 objection, without waiving our request for a  
 04 20 26PM 19 mistrial, we have no objection to proceeding. At  
 04 20 29PM 20 the conclusion of the rendering of the verdict,  
 04 20 32PM 21 then, there were pleadings filed as described by  
 04 20 35PM 22 Ms. Polk, and the confusion between Exhibit 734,  
 04 20 38PM 23 which was in evidence, and 744, the portion which  
 04 20 41PM 24 she had marked for an exhibit in this proceeding  
 04 20 44PM 25 that was not in evidence.  
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04 20 43PM 1 My point, Judge, is she admits today that  
 04 20 47PM 2 she played an audio clip that was never admitted in  
 04 20 51PM 3 front of this jury. But more importantly, she was  
 04 20 55PM 4 admonished or cautioned by this court prior to the  
 04 21 00PM 5 playing of that clip and warned that the  
 04 21 03PM 6 consequence under Arizona law is a mistrial.

04 21 03PM 7 I read in the responsive pleading a  
 04 21 07PM 8 complaint or a veiled reference, perhaps, a  
 04 21 13PM 9 criticism to the defense that we had had to move  
 04 21 17PM 10 for a mistrial. Yet I hear in this lengthy  
 04 21 21PM 11 argument today that -- and, of course, this is true  
 04 21 25PM 12 under Arizona law that if we do not request a  
 04 21 27PM 13 mistrial, then that issue is not preserved on  
 04 21 29PM 14 appeal, and then the state would argue waiver.

04 21 33PM 15 So obviously it's necessary that when we  
 04 21 36PM 16 believe that a violation of our client's rights or  
 04 21 42PM 17 a violation of the rule of evidence or the  
 04 21 44PM 18 substantive criminal law of the State of Arizona  
 04 21 46PM 19 has taken place, not only is it important to bring  
 04 21 49PM 20 that out to the Court, but then request a  
 04 21 52PM 21 particular remedy, whether it's preclusion or in  
 04 21 55PM 22 some cases a mistrial.

04 21 57PM 23 So yes. We did move for a mistrial  
 04 21 58PM 24 repeatedly. We did so with understanding that what  
 04 22 04PM 25 we were doing is preserving the record for this

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04 22 06PM 1 very proceeding, and if our motion for a new trial  
 04 22 09PM 2 is denied, subsequent proceedings.

04 22 13PM 3 Very similar -- and this, of course, was  
 04 22 15PM 4 at the aggravation phase. But I point out, Judge,  
 04 22 20PM 5 again -- and I heard an admission that this was  
 04 22 24PM 6 error in regards to playing the tape containing  
 04 22 29PM 7 Kirby Brown's statement made during the seminar  
 04 22 33PM 8 back during October of 2009. And on page 19 of the  
 04 22 37PM 9 defendant's motion, the exact statement of Ms. Polk  
 04 22 41PM 10 is included in the text of the motion.

04 22 46PM 11 Ms. Polk says in her closing arguments,  
 04 22 51PM 12 and here's what we know about Kirby Brown's frame  
 04 22 56PM 13 of mind as she entered the sweat lodge. We know  
 04 22 58PM 14 that the defendant knew this too because this is  
 04 23 01PM 15 the statement that Kirby made on Thursday after she  
 04 23 03PM 16 had come off the Vision Quest during an open-mic  
 04 23 07PM 17 session.

04 23 07PM 18 The reason that argument is so egregious,  
 04 23 10PM 19 Judge, is because I ask you to think back to the  
 04 23 14PM 20 heated discussion objecting to the admission of  
 04 23 17PM 21 that tape in front of this jury and your admission  
 04 23 22PM 22 for a limited purpose and a cautionary instruction  
 04 23 27PM 23 provided to the jury at that time that it could  
 04 23 29PM 24 only be used as an argument to provide notice to  
 04 23 34PM 25 the defendant, period.

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04 23 35PM 1 And yet the government turns around,  
 04 23 39PM 2 then, and despite that direction and admonition  
 04 23 42PM 3 from this court, violates your court order. And if  
 04 23 44PM 4 I recall correctly, again, you had to instruct the  
 04 23 47PM 5 jury.

04 23 48PM 6 Finally, the government admits the third  
 04 23 51PM 7 error as the late disclosure of the Haddow email.  
 04 23 55PM 8 The great thing about the record, Judge, is that  
 04 24 02PM 9 it's black and white. And it's not anything that I  
 04 24 05PM 10 say or argue today. It's the actual evidence --  
 04 24 08PM 11 the exhibits, the testimony, and the evidentiary  
 04 24 13PM 12 objections preserved for the appellate record which  
 04 24 16PM 13 constitutes the record.

04 24 17PM 14 Ms. Do made a detailed record in regards  
 04 24 21PM 15 to the circumstances surrounding the Haddow  
 04 24 25PM 16 nondisclosure of potentially exculpatory evidence  
 04 24 30PM 17 in violation of Brady and Kyles. And this court  
 04 24 32PM 18 found the Brady violation. This is not something  
 04 24 34PM 19 that now three months later in a four-hour argument  
 04 24 39PM 20 can somehow be argued away, because it is a fact.

04 24 41PM 21 It is the law of this case that the state  
 04 24 43PM 22 violated my client's constitutional rights, that  
 04 24 46PM 23 you found a Brady violation as it related to the  
 04 24 49PM 24 Haddow report.

04 24 50PM 25 What further exacerbates it, similar to  
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04 24 54PM 1 the prior two instances of admitted misconduct, is  
 04 24 57PM 2 that on the redirect of Deputy Diskin, Ms. Polk  
 04 25 01PM 3 asks the fateful question, is that opinion in  
 04 25 05PM 4 regards to carbon dioxide consistent with the  
 04 25 09PM 5 report from that fellow named Mr. Haddow, a blatant  
 04 25 16PM 6 violation of the court order.

04 25 17PM 7 Because contrary to the argument today,  
 04 25 18PM 8 prior to my cross-examination of Detective Diskin,  
 04 25 22PM 9 we conferred with the Court as to the permissible  
 04 25 24PM 10 scope of my questioning as it related to the Brady  
 04 25 29PM 11 violation.

04 25 30PM 12 And I would submit, Judge, in all candor  
 04 25 33PM 13 to the Court, with the exception of using one word,  
 04 25 36PM 14 "Brady," I was in full compliance with the  
 04 25 38PM 15 directive of the Court. And as indicated in the  
 04 25 41PM 16 motion, Ms. Polk jumps from -- and this is on  
 04 25 53PM 17 page 15 and, again, part of the record. She jumps  
 04 26 01PM 18 from asking Detective Diskin this question: Do you  
 04 26 04PM 19 recall what you told Ms. Do during the interview of  
 04 26 07PM 20 June 16, 2010, about carbon dioxide?

04 26 09PM 21 Yes.

04 26 10PM 22 What did you tell her?

04 26 11PM 23 That I believed the deaths were a result  
 04 26 14PM 24 of a combination of heat and carbon dioxide.

04 26 16PM 25 First of all, a lay witness speaking to  
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04 26 20PM 1 the ultimate issue in a case -- in a homicide case  
 04 26 22PM 2 is improper. And that response and question  
 04 26 24PM 3 itself, in my mind, is objectionable.

04 26 27PM 4 But ignoring that, we jump from  
 04 26 33PM 5 Detective Diskin's conclusionary opinion in regards  
 04 26 36PM 6 to the cause of death to the following question:  
 04 26 39PM 7 Is that consistent with the information you learned  
 04 26 42PM 8 from the man named Haddow?

04 26 42PM 9 Yes.

04 26 42PM 10 A blatant violation, Judge, of your  
 04 26 46PM 11 orders.

04 26 48PM 12 I find it disingenuous to state that the  
 04 26 53PM 13 vast majority of cases do not grant a mistrial.  
 04 26 57PM 14 And I would submit, Judge, two things to this  
 04 27 00PM 15 court. One is the vast majority of the cases cited  
 04 27 05PM 16 by the State of Arizona and the defense in this  
 04 27 08PM 17 motion evaluate one instance of misconduct, not an  
 04 27 15PM 18 admitted three instances of misconduct.

04 27 20PM 19 I take issue, Judge, with the term that  
 04 27 23PM 20 today the government freely admits error. The  
 04 27 30PM 21 reason I take issue is that, if you recall, in  
 04 27 33PM 22 response to our Brady motion as it relates to  
 04 27 35PM 23 Mr. Haddow, the State of Arizona accused the  
 04 27 37PM 24 defense of being less -- and displaying less than  
 04 27 41PM 25 full candor with the Court. In other words, in a

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04 27 43PM 1 lay person's terms, calling me a liar.

04 27 51PM 2 And then today to stand up five months  
 04 27 55PM 3 later in front of this court and say that they  
 04 27 58PM 4 freely admit as ministers of justice that they  
 04 28 02PM 5 violated my client's constitutional rights on three  
 04 28 05PM 6 separate occasions but -- and I'm being facetious,  
 04 28 08PM 7 Judge, and I apologize. But let me spend the next  
 04 28 13PM 8 four hours explaining why the other 28 instances  
 04 28 18PM 9 don't count, I find that disingenuous.

04 28 21PM 10 Ms. Polk said that to the extent that  
 04 28 25PM 11 they did occur, the justification or the  
 04 28 30PM 12 harmless-error analysis is that it's okay because  
 04 28 33PM 13 the Court frequently gave cautionary instructions.

04 28 37PM 14 That begs the question, Judge, that if  
 04 28 40PM 15 the State of Arizona is assigned the awesome  
 04 28 45PM 16 responsibility of being a minister of justice, why  
 04 28 49PM 17 do they ever need to be cautioned? Why do they  
 04 28 53PM 18 need to be cautioned repeatedly? Why did they  
 04 28 58PM 19 violate, admittedly, court orders on three separate  
 04 29 02PM 20 occasions as to significant errors as set forth in  
 04 29 07PM 21 our motion and admitted by Ms. Polk today?

04 29 10PM 22 Ms. Polk, and this emphasizes my point,  
 04 29 13PM 23 cites to the Minnitt case. And I circled this word  
 04 29 17PM 24 in her response. That the isolated case of  
 04 29 38PM 25 misconduct is not sufficient grounds for mistrial.

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04 29 43PM 1 And when we have three admitted cases or situations  
 04 29 47PM 2 of misconduct with 28 others, which included  
 04 29 52PM 3 frequently instructing the jury to cure the defect,  
 04 29 58PM 4 does that fall under the definition of "isolated  
 04 30 00PM 5 error"? I would submit, Judge, it does not.

04 30 09PM 6 To argue semantically the distinction  
 04 30 12PM 7 between withholding evidence, which was presented  
 04 30 16PM 8 during, I believe, the December 14, 2009,  
 04 30 19PM 9 PowerPoint presentation when Detective Diskin had  
 04 30 24PM 10 the medical diagnosis of an individual affected  
 04 30 28PM 11 during the 2005 sweat lodge -- Daniel P. -- wrong,  
 04 30 32PM 12 then today argue that that was not withheld when  
 04 30 36PM 13 that meeting was not discovered until the  
 04 30 41PM 14 investigatory interview by Ms. Do some seven months  
 04 30 45PM 15 later, when you are a minister of justice to  
 04 30 51PM 16 protect the constitutions of the United States and  
 04 30 53PM 17 Arizona, you have an obligation under Rule 15 to  
 04 30 55PM 18 disclose that information. It's not an obligation  
 04 30 58PM 19 for us to discover it, and then put up a smoke  
 04 31 02PM 20 screen that somehow, somehow, a medical examiner  
 04 31 08PM 21 employed by Yavapai and Coconino County falls under  
 04 31 12PM 22 the purview of work product and is protected.  
 04 31 15PM 23 That's why we used the term "withheld."

04 31 18PM 24 But in reality, it's simply a semantic  
 04 31 22PM 25 difference. Because you found a violation. And  
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04 31 24PM 1 the sanction imposed was attorneys' fees. So when  
 04 31 27PM 2 we look at the cumulative effect of conduct  
 04 31 30PM 3 beginning on December 14, I believe it is -- I  
 04 31 33PM 4 could have the date wrong -- 2009, to a \$5 million  
 04 31 38PM 5 bond on February 2nd or 4th, to a nondisclosure and  
 04 31 42PM 6 withholding information that has to be discovered,  
 04 31 44PM 7 whether it's the December meeting or the Haddow  
 04 31 48PM 8 report, to the beginning of trial, and then to sit  
 04 31 51PM 9 and tell the Court today that there has been no  
 04 31 56PM 10 late disclosure -- and Miriam just added them up.  
 04 32 00PM 11 There are 17 supplemental disclosure statements  
 04 32 03PM 12 filed since the first day of trial in this case.

04 32 05PM 13 And, Judge, you stated, and it's quoted  
 04 32 08PM 14 in our motion, that this is not going to be a trial  
 04 32 11PM 15 by surprise. And that's exactly what it was when  
 04 32 14PM 16 every day we walked in here -- and I'm  
 04 32 17PM 17 exaggerating. But every week we walked in here  
 04 32 21PM 18 with a little clip and said, oh, by the way. I'm  
 04 32 23PM 19 going to play this. No opportunity to review the  
 04 32 26PM 20 accuracy or prepare a defense for our client. Just  
 04 32 30PM 21 shoot from the hip, to try this case on the run  
 04 32 34PM 22 with multiple attorneys was necessary.

04 32 38PM 23 And then to stand here today and say we  
 04 32 41PM 24 gave them everything, when there has been 17 -- on  
 04 32 44PM 25 the record 17 supplemental disclosure statements

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04 32 47PM 1 after the first day of trial. And that excludes,  
 04 32 51PM 2 Judge, the Haddow incident that I previously  
 04 32 54PM 3 described, the Amayra and Michael Hamilton debacle,  
 04 33 00PM 4 which involved disclosure of staged photographs.  
 04 33 04PM 5 And that's their word on the record, not mine.  
 04 33 06PM 6 That ignores all that.  
 04 33 08PM 7 It's just simply 17 additional disclosure  
 04 33 10PM 8 statements that we're supposed to somehow deal with  
 04 33 14PM 9 when the rules say complete disclosure 20 days  
 04 33 15PM 10 prior to trial.

04 33 15PM 11 And somehow to twist that around and  
 04 33 18PM 12 attempt to shift the burden of proof because Mr. Li  
 04 33 22PM 13 in his opening statement says the defense in this  
 04 33 25PM 14 case is an inadequate investigation, may have been  
 04 33 29PM 15 a multitude of things including organophosphates  
 04 33 33PM 16 poisoning. And to withhold for a length of time --  
 04 33 36PM 17 and, again, this is in the record -- information  
 04 33 40PM 18 from Dr. Mosley, I believe it is, Dr. Blume, in  
 04 33 44PM 19 regards to the viability of those tests -- and  
 04 33 48PM 20 we're coming here every day in a jury trial.

04 33 50PM 21 This isn't a three-month time period in a  
 04 33 54PM 22 pretrial setting where we're sitting in our office  
 04 33 57PM 23 and have the ability to discuss and confer amongst  
 04 34 00PM 24 one another. We're preparing witness testimony.

04 34 08PM 25 The lawsuit argument that I just heard is  
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04 34 12PM 1 incredulous. Ms. Polk -- and we cited her exact  
 04 34 15PM 2 words, we don't know about them. And then later  
 04 34 19PM 3 she says -- and we cited this in the motion -- we  
 04 34 22PM 4 are aware of them.

04 34 24PM 5 But I point this out to you, Judge: The  
 04 34 26PM 6 very first hearing I came to in this courtroom,  
 04 34 29PM 7 Mr. McGroder, Mr. Murphy and Mr. Diesel, three  
 04 34 34PM 8 friends of mine, were in this courtroom on the  
 04 34 36PM 9 prosecution side. And they were representing  
 04 34 39PM 10 individuals affected by the sweat lodge in some  
 04 34 41PM 11 capacity. And they had conversations with the  
 04 34 44PM 12 State of Arizona.

04 34 45PM 13 And then to argue that they had no  
 04 34 48PM 14 knowledge of pending civil litigation and argue to  
 04 34 52PM 15 this court one day, we don't know about the  
 04 34 54PM 16 lawsuits, and then the next day say, we do know  
 04 34 57PM 17 about the lawsuits, in the face of these civil  
 04 35 00PM 18 attorneys who were representing the victims, which  
 04 35 06PM 19 under the Arizona Constitution, have the right to  
 04 35 08PM 20 notice of proceedings.

04 35 10PM 21 And I would have to presume that notice  
 04 35 17PM 22 of the proceedings went through their counsel.  
 04 35 21PM 23 Then to sit here and argue to you that when Mr. Li  
 04 35 24PM 24 attempts to use the first lawsuit as impeachment  
 04 35 24PM 25 evidence, that the state doesn't have knowledge of

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04 35 27PM 1 its own witnesses' litigations against my client.  
 04 35 37PM 2 And the importance, Judge -- and here's  
 04 35 38PM 3 where the State of Arizona is so far off the mark.  
 04 35 45PM 4 The importance is that as a minister of justice,  
 04 35 51PM 5 the State of Arizona has a duty to seek out  
 04 35 53PM 6 potentially exculpatory evidence. And what could  
 04 35 57PM 7 be more exculpatory when it comes to impeaching the  
 04 36 01PM 8 credibility of a witness if that witness has, in  
 04 36 03PM 9 fact, sued JRI or James Ray and requesting money  
 04 36 08PM 10 damages. It's clearly potentially exculpatory.

04 36 11PM 11 If that witness is under the control of  
 04 36 14PM 12 the State of Arizona, then they have a duty to  
 04 36 15PM 13 disclose. And I find it is disingenuous to argue  
 04 36 22PM 14 to this court that they had no knowledge when this  
 04 36 24PM 15 court was packed with civil attorneys representing  
 04 36 30PM 16 those folks.

04 36 34PM 17 Mr. Rock's testimony took place after --  
 04 36 51PM 18 and if you recall the sequence -- I may have the  
 04 36 54PM 19 days wrong, Judge. But it was on a Friday. And it  
 04 36 57PM 20 was a bench conference. And the first disclosure  
 04 37 00PM 21 of the new factual information that somehow his  
 04 37 05PM 22 repressed memory more accurately recalled what had  
 04 37 10PM 23 happened 18 months ago -- and we had a bench  
 04 37 12PM 24 conference, and we had to take a break.

04 37 15PM 25 Then there was an argument. I said, this  
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04 37 17PM 1 man needs counsel. And the reason is because  
 04 37 19PM 2 either he is providing false information in October  
 04 37 23PM 3 of 2009 or he committed perjury in November of 2010  
 04 37 27PM 4 or is committing perjury today.

04 37 31PM 5 That request for an attorney was objected  
 04 37 33PM 6 to by the State of Arizona. After you appointed  
 04 37 38PM 7 Mr. Launders to represent Mr. Rock, Mr. Launders  
 04 37 42PM 8 stood here on the record and said, I'm advising  
 04 37 45PM 9 Mr. Rock not to testify because he is going to  
 04 37 48PM 10 perjure himself. That is on the record. That  
 04 37 51PM 11 statement was made in front of the State of  
 04 37 51PM 12 Arizona.

04 37 54PM 13 And despite that, they presented his  
 04 37 56PM 14 testimony and their -- his case. And maybe it's  
 04 38 00PM 15 not in this motion, but it was discussed during the  
 04 38 03PM 16 Rock testimony. It's out of Tucson. And  
 04 38 07PM 17 presenting perjured testimony is grounds for a  
 04 38 10PM 18 reversal.

04 38 11PM 19 You cautioned the State of Arizona in  
 04 38 13PM 20 that regard. And it went ignored. And the  
 04 38 21PM 21 argument, Judge, was that somehow his emotional  
 04 38 24PM 22 condition repressed his memory. And I brought up  
 04 38 27PM 23 the fact that I've represented innumerable  
 04 38 30PM 24 individuals in Yavapai County who are cited with  
 04 38 32PM 25 the crime for providing the false name to a police

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04:38:38PM 1 officer by the very county attorney's office who is  
 04:38:38PM 2 now arguing that that's not a false statement.  
 04:38:50PM 3 When Ms. Polk argues that there is no  
 04:38:50PM 4 citation of authority supporting the fact that the  
 04:38:50PM 5 government cannot present perjured testimony, it  
 04:38:58PM 6 begs the question, do we live in a society that, in  
 04:39:01PM 7 fact, encourages convictions based on perjured  
 04:39:08PM 8 testimony? Is that the standard incorporated by a  
 04:39:08PM 9 minister of justice?

04:39:14PM 10 When I listen to the State of Arizona  
 04:39:23PM 11 parse individual case law from the State of Arizona  
 04:39:27PM 12 as it relates to prosecutorial misconduct,  
 04:39:30PM 13 providing examples to this court as to why this  
 04:39:34PM 14 constitutes harmless error in this case -- Judge,  
 04:39:38PM 15 what the State of Arizona has done is taken almost  
 04:39:42PM 16 every published decision in the State of Arizona --  
 04:39:46PM 17 and they've had to isolate those specific cases  
 04:39:51PM 18 summarily and then argue to you that it did not  
 04:39:53PM 19 deny my client a fair trial.

04:39:57PM 20 But what's important to remember is all  
 04:39:59PM 21 those cases that have been argued for last four  
 04:40:02PM 22 hours, they're all incorporated into one jury trial  
 04:40:06PM 23 in the James Ray case. Listen to Ms. Polk's  
 04:40:11PM 24 argument. If it's vouching, I have a case. If  
 04:40:16PM 25 it's misstating the law, I have a case. For the

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04:40:18PM 1 frivolous argument I've got a case. If it's  
 04:40:21PM 2 admitting or arguing evidence that's not been  
 04:40:24PM 3 admitted, I have a case. If it's shifting the  
 04:40:27PM 4 burden, I have a case. If it's commenting on my  
 04:40:30PM 5 client's right to remain silent, I have a case.

04:40:33PM 6 What's important is every one of those  
 04:40:36PM 7 cases is incorporated into this case. And the  
 04:40:40PM 8 issue is, as briefed in our motion, is whether or  
 04:40:46PM 9 not in Yavapai County, Arizona, in 2011 James  
 04:40:51PM 10 Arthur Ray received a fair trial.

04:40:53PM 11 The decision, Judge, is squarely yours.  
 04:40:58PM 12 It is.

04:40:59PM 13 And I know and Ms. Polk knows and  
 04:41:02PM 14 Mr. Hughes knows that you've sat in all three of  
 04:41:06PM 15 these chairs. You've been a felony prosecutor, and  
 04:41:09PM 16 you know the special responsibilities of the State  
 04:41:14PM 17 of Arizona when it comes to accusing someone of a  
 04:41:16PM 18 serious crime.

04:41:17PM 19 You sat in this chair, and you know the  
 04:41:20PM 20 ethical obligations and the level of diligence  
 04:41:24PM 21 required to represent someone charged with a  
 04:41:31PM 22 serious crime. And, of course, you've spent many  
 04:41:34PM 23 years as a criminal judge on the bench as the  
 04:41:38PM 24 gatekeeper of evidence and managing the trial as  
 04:41:39PM 25 set forth by the supreme court in the Poole

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04:41:42PM 1 decision.

04:41:47PM 2 Judge, the record -- it is what it is.  
 04:41:56PM 3 It speaks for itself. And my argument today  
 04:41:59PM 4 doesn't change the record. My argument today -- I  
 04:42:08PM 5 can't read your mind. I know you have the  
 04:42:08PM 6 intellect and the experience to evaluate the case  
 04:42:12PM 7 law, as argued by Ms. Polk, and her misapplication  
 04:42:16PM 8 and misinterpretation of the case law.

04:42:20PM 9 And I know for a fact that you were here  
 04:42:22PM 10 from day one throughout the course of this trial  
 04:42:26PM 11 and heard everything that's on the record that I  
 04:42:28PM 12 heard.

04:42:33PM 13 And, Judge, I would -- I'd state that  
 04:42:41PM 14 it's an awesome responsibility after four and a  
 04:42:48PM 15 half months of taxpayers' money and the devotion  
 04:42:51PM 16 provided to this case to enter an order that says,  
 04:42:58PM 17 you know, based on my experience as a prosecutor,  
 04:43:01PM 18 my experience as a defense lawyer, my experience as  
 04:43:04PM 19 an experience criminal trial judge, that in this  
 04:43:07PM 20 case on this day James Ray did not receive a fair  
 04:43:11PM 21 trial.

04:43:13PM 22 If that's the case, Judge -- again, we've  
 04:43:16PM 23 adequately briefed this. And I'd ask just a few  
 04:43:19PM 24 moments to miss -- correct the application of the  
 04:43:23PM 25 Hughes case by Ms. Seifter. If she can have five

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04:43:26PM 1 minutes before the end of the day.

04:43:28PM 2 But it's the cumulative effect of all  
 04:43:30PM 3 this impropriety that it may have had on the  
 04:43:36PM 4 verdict in this case that you have to decide. What  
 04:43:38PM 5 we're asking you to do, Judge, is to decide that  
 04:43:43PM 6 Mr. Ray, given all this impropriety, deserves a new  
 04:43:49PM 7 trial.

04:43:49PM 8 And, Judge, I would ask that Ms. Seifter  
 04:43:51PM 9 address that one case law issue.

04:43:53PM 10 THE COURT: All right.

04:43:54PM 11 Ms. Seifter.

04:43:55PM 12 MS. SEIFTER: Thank you, Your Honor. Thank  
 04:43:59PM 13 you, Judge. This should be brief.

04:44:12PM 14 I want to make three clarifications  
 04:44:14PM 15 regarding the applicable legal standard for the new  
 04:44:17PM 16 trial motion as it applies to an argument regarding  
 04:44:21PM 17 prosecutorial misconduct.

04:44:22PM 18 The first pertains to the harmless-error  
 04:44:25PM 19 doctrine. There has been some dispute about that  
 04:44:27PM 20 this morning. It is set forth correctly in our  
 04:44:31PM 21 brief. And the parties agree that the  
 04:44:33PM 22 harmless-error doctrine does apply to a Rule 24  
 04:44:37PM 23 motion.

04:44:38PM 24 The correct standard comes from State  
 04:44:42PM 25 versus Bible and is drawn from the United States

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04 44 44PM 1 Supreme Court decision in Chapman versus  
04 44 46PM 2 California. And it is the case that the state has  
04 44 48PM 3 the burden of proving beyond a reasonable doubt  
04 44 50PM 4 that the error was harmless.

04 44 52PM 5 Now, to be sure, it is the defense that  
04 44 54PM 6 has to establish that error occurred. And that is  
04 44 56PM 7 what the State versus Hughes case is talking about  
04 45 02PM 8 when it makes passing reference to what a defendant  
04 45 04PM 9 needs to demonstrate to succeed in a case regarding  
04 45 06PM 10 prosecutorial misconduct. We agree with that.

04 45 11PM 11 But it is not the case, as I believe  
04 45 13PM 12 Ms. Polk suggested a few minutes ago, that the  
04 45 16PM 13 State versus Hughes case somehow overruled State  
04 45 20PM 14 versus Bible when it comes to setting forth the  
04 45 22PM 15 standard for harmless error.

04 45 24PM 16 To the contrary, the exact opposite is  
04 45 27PM 17 true. Hughes cites State versus Bible -- that's at  
04 45 30PM 18 page 80 of the Hughes decision -- as setting forth  
04 45 33PM 19 the binding harmless error standard.

04 45 37PM 20 The second clarification pertains to the  
04 45 40PM 21 state's reliance on a case called "State versus  
04 45 44PM 22 Morris" for the proposition that the defendant  
04 45 46PM 23 bears the burden of showing harmlessness.

04 45 49PM 24 The passage in Morris is discussing the  
04 45 51PM 25 very different doctrine of fundamental error,

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04 45 54PM 1 which, of course, applies when a defendant fails to  
04 45 57PM 2 object at trial and an appellate court is reviewing  
04 46 00PM 3 to determine whether an error was fundamental. And  
04 46 03PM 4 in that situation the defendant does bear the  
04 46 05PM 5 burden. That's not our situation here, of course.  
04 46 08PM 6 And third, Your Honor, I believe the  
04 46 10PM 7 state suggested that a prosecutor's error cannot  
04 46 14PM 8 result in mistrial or new trial unless the error  
04 46 17PM 9 was intentional. And that is not the law in  
04 46 19PM 10 Arizona.

04 46 21PM 11 The fact that that is not the law is made  
04 46 24PM 12 clear by a number of authorities, one of which the  
04 46 26PM 13 state relied on heavily, which is the case of State  
04 46 29PM 14 versus Trani. That decision makes clear that there  
04 46 33PM 15 is in many cases a two-step inquiry involving two  
04 46 37PM 16 distinct questions.

04 46 38PM 17 The first question is -- now I'm quoting  
04 46 41PM 18 from Trani -- whether the state's, quote, improper  
04 46 43PM 19 conduct or actions necessitated a mistrial or a new  
04 46 46PM 20 trial. And then a separate question is whether  
04 46 49PM 21 that inappropriate conduct was intentional. And,  
04 46 52PM 22 if so, the double jeopardy bar applies.

04 46 56PM 23 That is not the issue before us, as we  
04 46 59PM 24 know. It's in our papers. We do believe that even  
04 47 00PM 25 that standard is met, that that is not the issue

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04 47 03PM 1 before you today. So it is not the case that a  
04 47 06PM 2 state's error needs to be intentional for a new  
04 47 08PM 3 trial to result.

04 47 10PM 4 And to provide a few other examples of  
04 47 13PM 5 that, for one thing, there would be, then, no new  
04 47 15PM 6 trials based on Brady violations, which, by their  
04 47 18PM 7 nature, need not be intentional. And our papers  
04 47 22PM 8 cite about half dozen cases in which a new trial  
04 47 25PM 9 was granted without any inquiry into whether the  
04 47 27PM 10 state's inappropriate conduct was intentional.

04 47 30PM 11 So those, Your Honor, are legal  
04 47 32PM 12 clarifications regarding the standard that applies.  
04 47 35PM 13 And, again, we ask that the Court grant our motion.

04 47 38PM 14 THE COURT: Thank you Ms. Seifter.

04 47 40PM 15 MS. POLK: Your Honor, may I correct something  
04 47 46PM 16 that I had said?

04 47 47PM 17 THE COURT: Okay.

04 47 48PM 18 MS. POLK: I just had made some references to  
04 47 49PM 19 transcripts. I didn't realize that partial trial  
04 47 53PM 20 transcripts have different pagination than the full  
04 47 57PM 21 transcript. And apparently they do. When I was  
04 47 58PM 22 referring to transcript pages, it was to partial  
04 48 02PM 23 trial transcripts. And we've attached all of those  
04 48 05PM 24 to our response. But apparently that would be a  
04 48 08PM 25 different page number if the Court is looking at a  
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04 48 10PM 1 full transcript.

04 48 11PM 2 Thank you.

04 48 12PM 3 THE COURT: Thank you. This matter is under  
04 48 16PM 4 advisement.

04 48 16PM 5 We're in recess.

6 (The proceedings concluded.)

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1 STATE OF ARIZONA )  
2 COUNTY OF YAVAPAI ) ss REPORTER'S CERTIFICATE  
3

4 I, Mina G Hunt, do hereby certify that I  
5 am a Certified Reporter within the State of Arizona  
6 and Certified Shorthand Reporter in California

7 I further certify that these proceedings  
8 were taken in shorthand by me at the time and place  
9 herein set forth, and were thereafter reduced to  
10 typewritten form, and that the foregoing  
11 constitutes a true and correct transcript.

12 I further certify that I am not related  
13 to, employed by, nor of counsel for any of the  
14 parties or attorneys herein, nor otherwise  
15 interested in the result of the within action

16 In witness whereof, I have affixed my  
17 signature this 12th day of February, 2012.  
18  
19  
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23 -----  
24 MINA G. HUNT, AZ CR No 50619  
25 CA CSR No 8335

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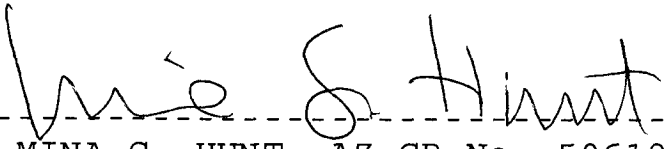
1 STATE OF ARIZONA )  
2 ) ss: REPORTER'S CERTIFICATE  
3 COUNTY OF YAVAPAI )

4 I, Mina G. Hunt, do hereby certify that I  
5 am a Certified Reporter within the State of Arizona  
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